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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. 71-951

ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Certiorari
Filed January 24, 1972
Certiorari Granted April 3, 1972

APPENDIX

RELEVANT DOCKET ENTRIES
(U.S. District Court)

1. May 26, 1967 Filed Complaint
2. May 26, 1967 Filed Declaration of Taking
3. May 29, 1967 Entered Order for Possession (filed 5/29/67)
4. July 3, 1967 Filed Notice of Appearance (Almota Farmers)

5. Oct. 14, 1968 Filed Defendant's Motion for Determination of the Law of the Case on Valuation of Building Improvements - Parcel "A"

6. Nov. 6, 1968 Filed Copy Reporter's Transcript - Oral Decision of the Court - Parcel "A"

7. Nov. 22, 1968 Entered Order Granting Defendant's Motion for Determination of Law - Parcel "A" (Defendant Almota Farmers entitled to full market value of its leasehold and building improvements as of date of taking)

8. March 5, 1969 Pretrial Conference

9. March 7, 1969 Entered Pre-Trial Order as to Parcel "A"

10. March 21, 1969 Record non jury trial - Court's determination: Judgment for defendant Almota Farmers Elevator and Warehouse Company

11. March 21, 1969 Filed Stipulation as to Parcel "A"

12. April 9, 1969 Entered Findings of Fact and Conclusions of Law as to Parcel "A"

13. April 9, 1969 Entered Judgment and Deficiency as to Parcel "A"

14. May 29, 1969 Filed (Plaintiff) Notice of Appeal as to Parcel "A"

15. July 7, 1969 Filed (Plaintiff) Motion to Extend Time for Designation and Filing Record and Docketing Appeal as to Parcel "A"

16. July 8, 1969 Entered Order Extending Time to Docket Record on Appeal (to 8/27/69)

17. July 18, 1969 Filed Copy Reporter's Transcript - Record of Proceedings at Trial

18. Aug. 19, 1969 Filed Copy Reporter's Transcript - Record of Proceedings on Motions

19. Aug. 20, 1969 Filed Stipulation for Designation of the Record on Appeal as to Parcel "A"

20. Aug. 22, 1969 Forwarded Record on Appeal to 9CCA

(Circuit Court)

21. Sept. 23, 1970 Filed opinion Reverse the Judgment and remand the case to the District Court with a direction to enter a judgment in favor of the condemnee, Almota Farmers Elevator and Warehouse Co. for $130,000.00, each party to bear its own costs.

22. Sept. 23, 1970 Filed and Entered Judgment

23. Oct. 12, 1970 Filed Original and 25 copies Appellee's Petition for Rehearing and Suggestion for rehearing en banc

24. Dec. 9, 1970 Filed Order (Md K Cy) Denying Petition for Rehearing

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs.	CIVIL NO. 3021
22.95 ACRES OF LAND, more or less situate in Whitman County, State of Washington; ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, a Washington Corporation; (names of other defendants omitted in printing) Defendants.	DEFENDENT'S MOTION FOR DETERMINATION OF THE LAW OF THE CASE ON VALUATION OF BUILDING IMPROVEMENTS

[Filed in the U. S. District Court, Eastern District of Washington, Oct. 14, 1968, Dorothy E. Moulton, Clerk, L.R. Deputy]

The Defendant hereby moves the Court as follows:

For an order determining that in the above entitled case the defendant, Almota Farmers Elevator and Warehouse Company, Incorporated, is entitled to be compensated for the full market value of its leasehold and its building improvements thereon as a unit as of the date of taking including both of the following:

The market value of the leasehold

exclusive of the building improvements being the difference between the value of the use and occupancy of the leasehold for the remainder of the term less the agreed rent to be paid.

Plus the market value of the building improvements in place upon the leased premises for use thereon without being limited to the value of their use for the remainder of the term.

This motion is made upon the grounds that a determination of the law to be applied in the valuation of the leasehold improvements must, in any event, be made in the trial of the case; that negotiations for possible settlement of the issue of valuation without trial are not possible without said determination; and that a forthwith determination of the applicable law will expedite the possibility of an agreed settlement.

This motion is based upon the records and files of the case and the attached affidavit of Lawrence Hickman, one of the attorneys for said defendant, and it is supported by the attached brief.

DATED this 11th day of October, 1968.

/s/ Lawrence Hickman
Lawrence Hickman of Attorneys
for said defendant

(Address and acknowledgment of service omitted in printing)

AFFIDAVIT IN SUPPORT OF MOTION
(Title omitted in printing)

STATE OF WASHINGTON)
) ss.
COUNTY OF WHITMAN)

Lawrence Hickman, being first duly sworn upon oath, deposes and says:

That he is one of the attorneys for the defendant, Almota Farmers Elevator and Warehouse Company, Incorporated; and that he is also business manager of the said company.

Said company owns an interest in Parcel "A" being condemned in the above entitled action as a lessee from the Oregon-Washington Railroad and Navigation Company, Union Pacific Railroad Company, and Camas Prairie Railroad Company for the storage and handling of grain at a current rent of $114.20 per year. The property has been occupied without interruption under various railroad leases since about 1919. The last day of the term of the present lease is

October 12, 1974.

The company has constructed elevator and warehouse improvements upon the leased premises of a present license capacity of 586,400 bushels of which 526,400 bushels is in upright storage. The lease provides that none of the building improvements to be constructed by the lessee shall become a part of the real estate. Those improvements are now the property of the company and the company has the right to and is obligated to remove them within six months after the termination of the lease. The lease contains no provision for a termination of the lease in the event of condemnation.

Insofar as the valuation of the property condemned is concerned the company has at all times contended that it is entitled to compensation equal to the market value on the date of taking both as to its leasehold interest and as to its building improvements the total being the equivalent of what the lease and improvements together would have sold for upon the market. Affiant has been informed by an attorney for plaintiff that it is plaintiff's contention that the only

DATED this 11th day of October, 1968.

/s/ Lawrence Hickman
Lawrence Hickman of Attorneys
for said defendant

(Address and acknowledgment of service omitted in printing)

AFFIDAVIT IN SUPPORT OF MOTION
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STATE OF WASHINGTON)
) ss.
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Insofar as the valuation of the property condemned is concerned the company has at all times contended that it is entitled to compensation equal to the market value on the date of taking both as to its leasehold interest and as to its building improvements the total being the equivalent of what the lease and improvements together would have sold for upon the market. Affiant has been informed by an attorney for plaintiff that it is plaintiff's contention that the only

compensation the company is entitled to is the market value of the leasehold including only the use value of the building improvements for the remainder of the term in reliance upon the case of United States vs. Petty, 327 U.S. 372. That affiant is informed and believes that the value as determined according to the contention of the plaintiff is far less than one half the value determined in accordance with the contentions of the defendant; and that it is not possible without a determination of the law applicable to the valuation of the leasehold improvements to enter into any negotiation towards settlement of the issue of valuation nor can any trial of that issue be concluded without a like determination.

/s/ Lawrence Hickman

SUBSCRIBED AND SWORN to before me this 14th day of October, 1968.

/s/ Philip H. Faris
NOTARY PUBLIC in and for the State of Washington, Residing at Colfax.

PRE-TRIAL ORDER AS TO PARCEL "A"
(Title omitted in printing)

[Filed in the U.S. District Court, Eastern District of Washington, Mar. 7, 1969, Dorothy E. Moulton, Clerk, L.R.,Deputy]

A pre-trial conference was held in the above-entitled proceedings as to Parcel "A" on March 5, 1969 at Spokane, Washington. Judge Charles L. Powell presided. The parties were represented as follows: Plaintiff United States of America by John H. McRae, Assistant United States Attorney, and defendant Almota Farmers Elevator and Warehouse Company, a corporation, by Lawrence Hickman, Attorney at Law. As a result, this pre-trial order has been formulated as follows:

NATURE OF PROCEEDINGS

This is a civil action commenced by plaintiff United States of America under power of eminent domain to acquire title to the lands and interest designated as Parcel "A" and to provide for the ascertainment of award and just compensation to the owners and parties in interest.

ADMITTED FACTS

The following facts have been agreed upon by the parties and require no proof:

1. This is an action to acquire title on behalf of the United States of America to an

interest in certain real property, and jurisdiction of this proceeding is vested in this Court under 28 USC 1358.

2. The United States of America commenced this action on May 26, 1967 by filing a Complaint in Condemnation and a Declaration of Taking and describing in said Complaint and said Declaration of Taking the lands and interest designated as Parcel "A".

3. The acquisition by the United States of America under power of eminent domain of the lands and interest designated as Parcel "A" was acquired as a public use and was authorized under the statutes set forth in the Complaint and Declaration of Taking filed herein.

4. The lands and interest designated as Parcel "A" were acquired by the United States of America for a public use in connection with the construction of the Little Goose Lock and Dam Project of the Corps of Army Engineers on the Snake River. The Little Goose Lock and Dam project is a project authorized by Congress for the construction of river improvement for purposes of navigation and other uses incident hereto, and the Snake River is a navigable river.

5. The parcel of land designated as

Parcel "A" consists of 0.75 of an acre located at Almota, in Whitman County, Washington. The fee title to said lands immediately prior to the filing of the Declaration of Taking was in the Oregon-Washington Railroad and Navigation Company, and the defendant Almota Farmers Elevator and Warehouse Company held a leasehold interest in the said lands and in the improvements situated thereon.

6. The United States has acquired in this proceeding all right, title and interest of the defendant Almota Farmers Elevator and Warehouse Company in and to the land described as Parcel "A", subject, however, to existing easements for public roads and highways, public utilities, roads and pipelines. The only known easement is the right of the Inland Power and Light Company, a corporation, to maintain an overhead power line and related facilities across said premises.

7. The date of taking in this proceeding is May 26, 1967, and the compensation to be paid for the taking of such lands and interest is computed as of said date, that is, May 26, 1967, in accordance with the condition the improvements therein were then in.

8. The interest of the defendant Almota Farmers Elevator and Warehouse Company in the land described as Parcel "A" and to the

improvements situated thereon is the interest set forth in that certain lease by and between defendant, as lessee, and the Oregon-Washington Railroad and Navigation Company, as lessor, copy of which is identified as Plaintiff's Exhibit No. 1 and which provides in pertinent part as follows:

(a) The lease term is a period of twenty years commencing October 13, 1954, and expiring October 12, 1974;

(b) The property is leased for the purpose of receipt, shipping, storage and handling of grain;

(c) The lessee may remove its buildings and improvements at the expiration of the lease, but if the lessee does not do so, they are to become the property of the lessor, who may remove them at lessee's expense.

(d) The lease contains no option for renewal.

9. On the date of taking, the improvements on Parcel "A" consisted of a grain elevator, including machinery and equipment for the storage and handling of grain. Among the facilities were the following:

(a) Head house elevator of wood crib construction with a capacity of 126,485 bu. divided into 18 bins;

(b) East Annex elevator of wood crib construction with a capacity of 125,290 bu. divided into 12 bins;

(c) West Annex elevator of wood crib construction with a capacity of 122,265

bu. divided into 12 bins;

(d) Concrete tank elevator with a capacity of 148,460 bu. (undivided).

It is agreed between the parties that the storage capacity of the above facilities is 522,500 bushels.

Adjacent to the above-described grain elevator is a "flat house" building of wood construction which has also been used for grain and other storage.

All of said facilities are located on the 0.75 acres described in the Complaint and owned by the defendant Almota Elevator and Warehouse Company and are subject to the leasehold interest of said defendant.

10. It is agreed by and between the parties hereto that the highest and best use of said facilities at the date of taking was that of a grain and pea storage and handling facility.

11. This proceeding involves the taking of the entire interest of the defendant, Almota Farmers Elevator and Warehouse Company in Parcel "A", and there are no severance damages.

12. The lands designated in the Complaint and Declaration of Taking as Parcel "A" are as described in Schedule A attached to said

Declaration of Taking, and the lands are as shown on the map designated as Schedule B, Segment 6, attached to said Declaration of Taking.

PLAINTIFF'S CONTENTIONS

The plaintiff's contentions are as follows:

1. The just compensation to be paid by the United States for the acquisition of Parcel "A" and the improvements situated thereon as of May 26, 1967 is the interest set forth in that certain lease by and between Almota Farmers Elevator and Warehouse Company and the Oregon-Washington Railroad and Navigation Company, without consideration of the possibility of renewal of the lease after its expiration on October 12, 1974;

2. Should the Court at time of trial permit the presentation of evidence based on the possibility of a renewal of the lease beyond its expiration date of October 12, 1974, the jury be instructed to return special verdicts as provided in Rule 49(a), Federal Rules of Civil Procedure, as follows:

> (a) A special verdict finding the amount of just compensation to be paid for Parcel "A" for the taking of defendant's leasehold interest therein consisting of a remaining term of

approximately seven and one-half years and without consideration of the possibility of a renewal of said lease;

(b) A special verdict finding the amount of just compensation to be paid for Parcel "A" for the taking of defendant's leasehold interest therein based upon the premise of the possibility of a renewal of the defendant's lease following the expiration of the seven and one-half years remaining of its term at the date of taking.

DEFENDANT'S CONTENTIONS

The contentions of the defendants are as follows:

1. At the time of the taking of defendant's leasehold and building improvements, defendant was the owner of three connected crib elevator buildings and a concrete storage tank of a total capacity of 522,500 bushels of bulk grain complete with all necessary machinery for the receiving of grain by truck and the loading out of the same by rail or truck, including two legs, a receiving pit and platform scale, a truck hoist, an elevator office and an automatic loading out scale, together with a storage flat house having a licensed capacity of 63,900 bushels, plus storage space of about 980 square feet.

2. That included as a part of the benefits, elements and appurtenances affecting the market value of said leasehold

and improvements was the location of said improvements immediately adjacent to a county roadway on the south side thereof and the use and access for rail shipments without any charge or cost of maintenance thereof of a railroad siding immediately to the north of said improvement sufficient in length to enable six grain cars to be spotted and loaded daily without any switching by the defendant, together with utilities consisting of electricity, telephone and water.

3. That the defendant has owned and operated elevator and warehouse facilities upon land leased from the railroad at Almota since 1919; that on and since said time numerous leases have been made and entered into, all of which, except for the lease in force and effect on May 26, 1967, were not to exceed five year leases; that each of said leases was automatically renewed upon each expiration dates; that the defendant at all times has been assured by the railroad that renewals thereof would continue so long as defendant continued to comply with the terms and provisions of each respective lease and continued to ship substantially all of its grain by rail,

and the officers of defendant have had every reason to believe the railroad would continue to grant the company lease renewals indefinitely into the future; that the policy of the railroad in question is to encourage and promote leasehold improvements upon its lands and to continue to renew all such leases so long as rail freight traffic is produced thereby for the railroad; that no such lease in the absence of a violation of the terms and provisions thereof is ever terminated or a renewal refused; and that that policy had been and was applied at Almota at the time of the taking on May 26, 1967.

4. The defendant is entitled to be compensated for the full market value of its leasehold and building improvements thereon as of the date of taking the same, the total value of said leasehold and improvements to be what the interest of said company therein could have been sold for upon the open market considering all elements and possibilities whatsoever found to then affect the market value of those interests, including, but not exclusive of, the possibilities of renewal of the lease.

5. That as a fact the market value of a railroad leasehold and elevator improvements and related appurtenances and elements of value where the lessee ships substantial-

ly all grain by rail is the full market value of a fee interest therein less only the market value of the unimproved leased land.

ISSUES OF FACT AND LAW

The issue of fact in this case is the amount of just compensation to be paid by the United States of America for the taking of Parcel "A".

The issue of law to be determined in this proceeding concerns the admissibility of evidence on the issues of just compensation at the time of trial.

EXHIBITS

It is agreed by the parties that on or before five (5) days prior to the date of trial, the parties will submit to the Clerk of Court for marking all available exhibits intended to be introduced at the time of trial. Exhibits not available at said time may be submitted later with the permission of the Court.

JURY

It is agreed that there will be a jury view of the premises involved. It is further agreed that no alternate juror will be chosen, and that in the event any one

juror becomes disqualified or is excused by the court, that the remaining eleven jurors may reach a verdict. It is further agreed that the jury verdict need not be unanimous, but that a verdict may be returned by an agreement of ten of the jurors.

EXPERT WITNESSES

1. The plaintiff may call not to exceed three expert witnesses on the issue of just compensation.

2. The defendants may call not to exceed three expert witnesses on the issue of just compensation.

TRIAL

The plaintiff shall have the right to open and close.

ACTION BY THE COURT

The Court has ruled that:

1. The issue of just compensation will be tried to a jury.

2. The defendant is entitled to be compensated for the full market value of its leasehold and building improvements thereon as of the date of taking the same, the total value of said leasehold and improvements with appurtenances and other elements of value to be what the interests of said company therein could have been then sold for upon the open

market considering all elements and possibilities whatsoever found to then affect the market value of those interests including, but not exclusive of, the possibilities of renewal of the lease and of the landlord requiring the removal of the improvements in the event of there being no lease renewal.

3. On or before March 12, 1969, the parties will exchange lists of comparable sales which have been investigated by the parties and may be used at the time of trial, with a copy of such list to be filed with the Court. The list shall include the location of the lands; date of sale; the names of buyer and seller; and the consideration for each sale. Each party is limited to a maximum of 12 comparable sales. The listing of any sale shall not constitute an admission by the listing party that such sale is in fact comparable.

IT IS HEREBY ORDERED that the foregoing constitutes the pre-trial order in the above-entitled action as to Parcel "A", and that it supplements the pleadings herein, and that it shall not be amended except by the consent of the parties or by order of the Court to prevent manifest injustice.

DATED this 6 day of March, 1969.

/s/ Charles L. Powell
United States District Judge

The foregoing form of pretrial order is hereby approved:

/s/ John H. McRae
JOHN H. McRAE
Assistant United States Attorney
Attorney for Plaintiff

/s/ Lawrence Hickman
LAWRENCE HICKMAN
Attorney for Almota Farmers Elevator and Warehouse Co.

STIPULATION AS TO PARCEL "A"
(Title omitted in printing)

[Filed in the U.S. District Court, Eastern District of Washington, Mar. 21, 1969, Dorothy E. Moulton, Clerk, L.R. Deputy

Comes now the plaintiff United States of America, by and through John H. McRae, Assistant United States Attorney, and the defendant Almota Farmers Elevator and Warehouse Company, a corporation, by Lawrence Hickman, Attorney at Law, and in connection with Parcel "A" of the above-captioned proceeding stipulate and agree to the following facts and procedures:

1. This is a civil action commenced by the plaintiff United States of America to acquire title to a certain interest in land designated in this proceeding as Parcel "A", which interest was required for public use by the United States in connection with the construction of the Little Goose Lock & Dam Project of the Corps of Army Engineers on the Snake River in Whitman County, Washington.

2. Parcel "A" is a parcel of land containing 0.75 of an acre lying within the existing right-of-way of the Oregon-Washington Railroad and Navigation Company in Whitman County, Washington, and said land is more particularly described

in Exhibit No. 1 attached to this Stipulation and by this reference made a part hereof.

3. The estate acquired in this proceeding to Parcel "A" is all right, title and interest of the defendant Almota Farmers Elevator and Warehouse Company in and to the land described on attached Exhibit No. 1, subject, however, to existing easements for public roads and highway, public utilities, railroads and pipelines, if any.

4. On May 26, 1967, the United States of America filed a Declaration of Taking in this proceeding and deposited the sum of $108,500.00 as estimated just compensation as to Parcel "A", and thereupon the estate set forth in Paragraph 3 of this stipulation vested in the United States of America. It is agreed that May 26, 1967 is the date of taking in this proceeding as to Parcel "A".

5. On May 26, 1967, the date of taking herein, the interest of the defendant Almota Farmers Elevator and Warehouse Company in the land designated as Parcel "A" was a leasehold interest in said land and the structures and improvements situated thereon, as said interest is set

forth in that certain agreement dated March 2, 1955 by and between the Oregon-Washington Railroad and Navigation Company as lessor and the defendant Almota Farmers Elevator and Warehouse Company as lessee. Copies of said leasehold agreement, with amendments, supplements and modifications thereto, are attached to this Stipulation as Exhibit No. 2, and it is hereby agreed that such copies may be admitted in evidence for all pertinent purposes, including the purpose of setting forth the leasehold rights of the defendant Almota Farmers Elevator and Warehouse Company in and to the land designated as Parcel "A".

6. The interest of the defendant Almota Farmers Elevator and Warehouse Company in the land described as Parcel "A" and to the improvements situated thereon is the interest set forth in that certain lease by and between defendant, as lessee, and the Oregon-Washington Railroad and Navigation Company, as lessor, copy of which is identified as plaintiff's Exhibit No. 2 and which provides in pertinent part as follows:

a. The lease term is a period of twenty years commencing October 13, 1954, and expiring October 12, 1974;

b. The property is leased for the purpose of receipt, shipping, storage and

handling of grain;

c. The lessee may remove its buildings and improvements at the expiration of the lease, but if the lessee does not do so, they are to become the property of the lessor, who may remove them at lessee's expense.

d. The lease contains no option for renewal.

7. It is stipulated and agreed that there is evidence available to the effect that as of May 26, 1967, the date of taking herein, and for some years prior thereto, the railroad company, as the owner of the fee simple title to lands subject to leasehold interest for grain elevators, was extending the terms of existing leaseholds or granting new leaseholds to former lessees upon the expiration of existing terms on the same or similar terms as the expired leaseholds, that it was generally accepted by lessees of the railroad that such renewals of the leasehold interest could be expected, and that railroads generally have not cancelled or refused to renew elevator or warehouse leases so long as the lessee remains in business and is producing freight traffic for the railroad. It is further stipulated and agreed that there is evidence available to the effect that buyers

of leasehold interests in railroad land were paying more for the unexpired term of the leasehold interest sold than the value of the bare legal rights possessed by the lessees under such leasehold agreements.

8. The plaintiff United States of America has contended that any evidence relating to the custom or practice in the community or the policy or practice of the parties relating to the extension of this or similar leases is not pertinent, material or competent, and that the just compensation to be paid for the taking of the defendant's leasehold interest, including building improvements, in Parcel "A" should be based upon the fair market value of the legal rights possessed by the defendant by virtue of the lease as of the date of taking, and that no consideration should be given to any additional value which might have been obtained upon the open market based upon a supposition or expectation that an extension of the defendant's leasehold interest could have been obtained from the lessor at a favorable rental.

9. The defendant Almota Farmers Elevator and Warehouse Company has contended

that the just compensation to be paid for the taking of its leasehold interest in Parcel "A" should be based upon what a willing buyer and a willing seller would have agreed upon as the fair market value for the unexpired term of the leasehold interest on the open market as of the date of taking, with consideration being given to the probability or possibility that the leasehold interest would be extended beyond the termination date set forth in the lease agreement, as it may affect market value.

10. The Court has made the following ruling at pretrial: ". . . the defendant, Almota Farmers Elevator and Warehouse Company, Incorporated, is held to be entitled to be compensated for the full market value of its leasehold "and building improvements thereon as of the date of taking the same, the total value of said leasehold and improvements to be what the interests of said company therein could have been then sold for upon the open market considering all the elements and possibilities whatsoever found to then affect the market value of those interests including but not exclusive of the possibilities of renewal of the lease and of the landlord requiring the removal of the improvements in the event of

there being no lease renewal."

11. It is further stipulated and agreed by and between the parties hereto that the buildings, structures and improvements, including installed grain handling equipment and machinery, comprising a part of the realty are no longer required by the plaintiff and that the right to remove said buildings, structures and improvements, including installed grain handling equipment and machinery, may be and hereby is excluded from the proceeding, and right to remove the improvements as aforesaid will be revested in the former owner, PROVIDED that the removal of such buildings, structures and improvements, including installed grain handling equipment and machinery be effectuated by the defendant on or before September 30, 1969, and PROVIDED FURTHER that in the event such equipment, machinery and improvements are not removed by the defendant on or before September 30, 1969, or such further date as may be agreed upon by the plaintiff and defendant, then the right of removal shall terminate automatically, and the United States of America shall have a good and indefeasible title to such equipment, machinery and improvements as remain without notice to the defendant.

12. It is stipulated and agreed that in the event that it is finally determined that the just compensation to be paid to the defendant Almota Farmers Elevator and Warehouse Company for the taking of Parcel "A" should be arrived at in accordance with the contentions of the plaintiff, as set forth in Paragraph 8 of this stipulation, THEN, in that event, the fair market value of the interest of the defendant Almota Farmers Elevator and Warehouse Company in the land and improvements designated as Parcel "A" as of May 26, 1967, and the amount of just compensation payable to the defendant for the taking of the estate condemned is the sum of $130,000.00, together with interest as hereinafter provided.

13. On the other hand, it is stipulated and agreed that in the event that it is finally determined that the just compensation to be paid to the defendant Almota Farmers Elevator and Warehouse Company for the taking of Parcel "A" should be arrived at in accordance with the contentions of the defendant, as set forth in Paragraphs 9 and 10 of this stipulation, THEN in that event, the fair market value of the interest of the defendant Almota Farmers Elevator and Warehouse Company

in the land and improvements designated as Parcel "A" as of May 26, 1967, and the amount of just compensation payable to the defendant for the taking of the estate condemned is the sum of $274,625.00, together with interest as hereinafter provided.

14. It is stipulated and agreed by and between the parties hereto that the following procedure may be utilized, subject to the approval of the Court, in the trial of this case and in the entry of judgment:

a. The case may proceed to trial before the Court sitting without a jury on the basis of the facts herein stipulated and upon the basis of the admitted facts as set forth in the Pre-Trial Order entered herein on March 6, 1969, namely, Paragraphs 1 through 12 of the Admitted Facts as set forth on pages 2 and 3, and 4 of said Order, and on lines 1 through 12 of page 5 of said Order.

b. Neither party admits to the relevancy, materiality or competency of any or all of such facts, although the truth of such facts may be admitted as hereinabove stipulated.

c. If the Court should determine at said trial that the just compensation to be paid to the defendant Almota Farmers Elevator and Warehouse Company for the taking of Parcel "A" should be arrived at in accordance with the contentions of the plaintiff, as set forth in Paragraph 8 of this stipulation, THEN the Court may enter a judgment determining the just compensation to be paid to the defendant to be the amount of $130,000.00, and it is further stipulated and agreed that in such event the Court should provide that the difference between such amount and the amount paid into the registry of the Court as estimated just compensation shall draw interest at the rate of six per cent (6%) per annum from the date of entry of such judgment until the amount of such deficiency has been paid into the registry of the Court, and further providing that no interest is payable by the United States on such deficiency for any period prior to the date of entry of such judgment.

d. On the other hand, if the Court should determine at said trial that the just compensation to be paid to the

defendant Almota Farmers Elevator and Warehouse Company for the taking of Parcel "A" should be arrived at in accordance with the contentions of the defendant as set forth in paragraphs 9 and 10 of this stipulation, THEN the Court may enter a judgment determining the just compensation to be paid to the defendant to be the sum of $274,625.00, and it is further stipulated and agreed that in such event the Court should provide that the difference between such amount and the amount paid into the registry of the Court as estimated just compensation shall draw interest at the rate of six per cent (6%) per annum from the date of entry of such judgment until the amount of such deficiency has been paid into the registry of the Court, and further providing that no interest is payable by the United States on such deficiency for any period prior to the date of entry of judgment.

e. The parties hereto reserve all exceptions to the Court's rulings and all rights to an appeal from the judgment of the Court, and in the event of reversal or remand, the terms of this stipulation shall be applicable as herein

set forth, including the amount of just compensation payable by the United States of America to the defendant Almota Farmers Elevator and Warehouse Company, and such terms shall prevail in the re-trial of this action or such other further hearings as the Appellate Court may require in accordance with the mandate of such Court.

15. It is further stipulated and agreed by and between the parties hereto that at the time judgment determining just compensation in this proceeding as to Parcel "A" is entered pursuant to this stipulation, whether such judgment be in the amount of $130,000.00 or in the amount of $274,625.00 as hereinbefore provided, then in either event, the plaintiff and the defendant shall file a stipulation that the terms of that certain order entered August 14, 1968, Amending Order of Possession as to Parcel "A", shall be amended so as to provide that the defendant may retain possession of the premises designated as Parcel "A" for the period March 1, 1969 to September 1, 1969 without the requirement of the payment of rent for such occupancy to the plaintiff, and further providing that the possession of the defendant of

said premises be extended to the date of September 30, 1969, also without the payment of rent, and further providing that in the event construction schedules permit and it is agreed by officials of the Corps of Army Engineers that the possession of the defendant of the premises may be extended to November 1, 1969, then in such event that the further extension of possession to November 1, 1969 shall also be without the requirement of the payment of rent on the part of the defendant.

DATED this 20 day of March, 1969.

/s/ John H. McRae
JOHN H. McRAE
Assistant United States Attorney

/s/ Lawrence Hickman
LAWRENCE HICKMAN
Of Attorneys for Defendant
Almota Farmers Elevator & Warehouse Co.

EXHIBIT "1"

(Legal description of Parcel "A" omitted in printing. See Page 58, Volume I, transcript of record.)

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. 22.95 ACRES OF LAND, etc.; ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY: et al, Defendants.	CIVIL NO. 3021 FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO PARCEL "A"

[Filed in the U.S. District Court, Eastern District of Washington, Apr. 9, 1969, Dorothy E. Moulton, Clerk, L.R. Deputy]

THIS MATTER came on regularly for trial on the issue of just compensation before this Court, sitting without a jury, at Spokane, Washington, on March 21, 1969.

The plaintiff United States of America appeared by John H. McRae and Robert M. Sweeney Assistant United States attorneys, and the defendant Almota Farmers Elevator and Warehouse Company, a corporation, appeared by Lawrence Hickman, its attorney of record.

By stipulation executed by the plaintiff and defendant as to Parcel A entered in this proceeding on March 21, 1969, the parties agreed to the facts necessary for the determination of the just compensation to be paid as to Parcel "A" and said parties further agreed to

the procedure to be followed in this proceeding as to the trial of the issue of just compensation as to Parcel A.

Trial by jury having been waived, and the Court having considered the pleadings on file herein, the facts agreed upon by the parties as set forth in the pre-trial order entered March 6, 1969 and in the stipulation of the parties filed March 21, 1969, and the Court otherwise being fully advised in the premises now makes the following:

FINDINGS OF FACT

1. This is a civil action commenced by the plaintiff United States of America under power of eminent domain to acquire title to the lands and interest designated as Parcel A and to provide for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C. 591), which act authorizes the acquisition of land for river and harbor purposes; the Act of Congress approved

March 2, 1945 (Public Law 14, 79th Congress), which act authorizes the construction of Little Goose Lock and Dam; and the Act of Congress approved October 15, 1966 (Public Law 89-689), which act appropriated funds for such purposes.

3. The public uses for which said land is taken are as follows: The said land is necessary to adequately provide for the construction of a river improvement for the purposes of navigation, and for other uses incident thereto. The said land has been selected by the Secretary of the Army for acquisition by the United States for use in connection with Little Goose Lock and Dam and for such other uses as may be authorized by Congress or by Executive Order.

4. The estate acquired in this proceeding as to Parcel A is all right, title and interest of the defendant Almota Farmers Elevator and Warehouse Company in and to the lands designated as Parcel A and described on Exhibit A attached hereto, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

5. The lands designated as Parcel A which are the subject matter of this proceeding are as described in Exhibit A attached hereto and made a part hereof.

6. The plaintiff United States of America acquired the estate set forth in Paragraph 4 of these Findings of Fact on May 26, 1967, when it filed in this proceeding a Declaration of Taking as to Parcel A and simultaneously deposited into the registry of the court the sum of $108,500.00 as estimated just compensation for the taking of said Parcel A.

7. The defendant Almota Farmers Elevator and Warehouse Company is a corporation organized and existing under the laws of the State of Washington.

8. On May 26, 1967, the date of taking herein, the defendant Whitman County, Washington, a municipal corporation, had an interest in the lands designated as Parcel A by reason of taxes and assessments due and exigible as of said date of taking, which taxes have heretofore been paid and satisfied and defendant Whitman County, Washington, a municipal corporation, has no further interest in the just compensation to be paid as to Parcel A.

9. The parcel of land designated as Parcel "A" consists of 0.75 of an acre located at Almota, in Whitman County, Washington. The fee title to said lands immediately prior to the filing of the Dec-

laration of Taking was in the Oregon & Washington Railroad and Navigation Company, and the defendant, Almota Farmers Elevator and Warehouse Company, held a leasehold interest in the said lands and in the improvements situated thereon.

10. On May 26, 1967, the date of taking herein, the leasehold interest of the defendant Almota Farmers Elevator and Warehouse Company in the land designated as Parcel A and the structures and improvements situated thereon was as set forth in that certain agreement dated March 2, 1955 by and between the Oregon-Washington Railroad and Navigation Company, as lessor, and the defendant Almota Farmers Elevator and Warehouse Company, as lessee.

11. The interest of the defendant Almota Farmers Elevator and Warehouse Company in the land described as Parcel "A" and to the improvements situated thereon is the interest set forth in that certain lease by and between defendant, as lessee, and the Oregon-Washington Railroad and Navigation Company, as lessor, and which provides in pertinent part as follows:

a. The lease term is a period of twenty years commencing October 13, 1954, and expiring October 12, 1974;

b. The property is leased for the purpose of receipt, shipping, storage and handling of grain;

c. The lessee may remove its buildings and improvements at the expiration of the lease, but if the lessee does not do so, they are to become the property of the lessor, who may remove them at leslee's expense.

d. The lease contains no option for renewal.

12. On the date of taking, the improvements on Parcel "a" consisted of a grain elevator, including machinery and equipment for the storage and handling of grain. Among the facilities were the following:

(a) Head house elevator of wood crib construction with a capacity of 126,485 bu. divided into 18 bins;

(b) East Annex elevator of wood crib construction with a capacity of 125,290 bu. divided into 12 bins;

(c) West Annex elevator of wood crib construction with a capacity of 122,265 bu. divided into 12 bins;

(d) Concrete tank elevator with a capacity of 148,460 bu. (undivided).

The storage capacity of the above facilities is 522,500 bushels. The highest and best use of said facility at the date of taking was that of a grain and pea storage

and handling facility.

Adjacent to the above-described grain elevator is a "flat house" building of wood construction which has also been used for grain and other storage.

All of said facilities are located on the 0.75 acres described in the Complaint and owned by the defendant Almota Farmers Elevator and Warehouse Company and are subject to the leasehold interest of said defendant.

13. There is evidence available to the effect that as of May 26, 1967, the date of taking herein, and for some years prior thereto, the railroad company, as the owner of the fee simple title to lands subject to leasehold interest for grain elevators, was extending the terms of existing leaseholds or granting new leaseholds to former lessees upon the expiration of existing terms on the same or similar terms as the expired leaseholds, that it was generally accepted by lessees of the railroad that such renewals of the leasehold interest could be expected, and that railroads generally have not cancelled or refused to renew elevator or warehouse leases so long as the lessee remains in business and is producing freight traffic for the railroad. There is evidence available to the effect

that buyers of leasehold interests in railroad land were paying more for the unexpired term of the leasehold interest sold than the value of the bare legal rights possessed by the lessees under such leasehold agreements.

14. The plaintiff United States of America has contended that any evidence relating to the custom or practice in the community or the policy or practice of the parties relating to the extension of this or similar leases is not pertinent, material or competent, and that the just compensation to be paid for the taking of the defendant's leasehold interest, including building improvements, in Parcel "A" should be based upon the fair market value of the legal rights possessed by the defendant by virtue of the lease as of the date of taking, and that no consideration should be given to any additional value which might have been obtained upon the open market based upon a supposition or expectation that an extension of the defendant's leasehold interest could have been obtained from the lessor at a favorable rental.

The fair market value of the interest of the defendant Almota Farmers Elevator and Warehouse Company in the land and im-

provements designated as Parcel A as of May 26, 1967, and the amount of just compensation payable to the defendant for the taking of the estate condemned as based upon the contention of the plaintiff United States of America as set forth in this paragraph of the Findings of Fact is the sum of $130,000.00, together with interest as provided in the stipulation of the parties filed herein on March 21, 1967.

15. The defendant Almota Farmers Elevator and Warehouse Company has contended that the just compensation to be paid for the taking of its leasehold interest in Parcel "A" should be based upon what a willing buyer and a willing seller would have agreed upon as the fair market value for the unexpired term of the leasehold interest on the open market as of the date of taking, with consideration being given to the probability or possibility that the leasehold interest would be extended beyond the termination date set forth in the lease agreement.

The defendant further contends that just compensation to be paid for the taking of its leasehold interest in Parcel A should be based upon the pre-trial ruling of this Court as follows: ". . . the defendant, Almota Farmers Elevator and Warehouse Company,

Incorporated, is held to be entitled to be compensated for the full market value of its leasehold and building improvements thereon as of the date of taking the same, the total value of said leasehold and improvements to be what the interests of said company therein could have been then sold for upon the open market considering all the elements and possibilities whatsoever found to then affect the market value of those interests including but not exclusive of the possibilities of renewal of the lease and of the landlord requiring the removal of the improvements in the event of there being no lease renewal."

The fair market value of the interest of the defendant Almota Farmers Elevator and Warehouse Company in the land and improvements designated as Parcel A as of May 26, 1967 and the amount of just compensation payable to the defendant for the taking of the estate condemned as based upon the contentions of the defendant as set forth in this paragraph of these Findings of Fact is the sum of $274,625.00, together with interest as provided in the stipulation of the parties filed herein on March 21, 1969.

16. The Court finds that the fair market value of the interest of Almota Farmers Elevator and Warehouse Company as of May 26,

1967, and the just compensation payable to said defendant is the amount of $274,625.00, together with interest as provided in the stipulation of the parties filed herein on March 21, 1969, which finding is based upon the contention of the defendant as set forth in paragraph 15 of these admitted facts and upon a consideration of the facts set forth in paragraph 13 of these Findings of Fact.

17. At the time of the filing of the Declaration of Taking herein the plaintiff deposited into the registry of the Court as estimated just compensation as to Parcel A the sum of $108,500.00. From the amount deposited as estimated just compensation as to Parcel A as aforesaid, there has been disbursed from the registry of the Court pursuant to the order for advance compensation filed herein on August 14, 1967, the sum of $107,000.00, which advance compensation was paid $105,000.00 and $168.70 to the Almota Farmers Elevator and Warehouse Company and the sum of $1,831.30 to the defendant Whitman County, Washington. The balance of the sum deposited as estimated just compensation as to Parcel A in the amount of $1,500.00 remains on deposit in the registry of this Court.

18. It has been stipulated and agreed

by and between the parties hereto that the buildings, structures and improvements, including installed grain handling equipment and machinery, comprising a part of the realty are no longer required by the plaintiff and that the right to remove said buildings, structures and improvements, including installed grain handling equipment and machinery,may be and hereby is excluded from the proceeding, and right to remove the improvements as aforesaid will be revested in the former owner, PROVIDED, that the removal of such buildings, structures and improvements, including installed grain handling equipment and machinery be effectuated by the defendant on or before September 30, 1969, and PROVIDED FURTHER that in the event such equipment, machinery and improvements are not removed by the defendant on or before September 30, 1969, or such further date as may be agreed upon by the plaintiff and defendant, then the right of removal shall terminate automatically, and the United States of America shall have a good and indefeasible title to such equipment, machinery and improvements as remain without notice to the defendant.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and the parties in this proceeding as to Parcel A.

2. United States of America had the right under the authorities set forth in the complaint filed herein to condemn for public use the lands and interests therein designated as Parcel A.

3. The Court concludes that the defendant Almota Farmers Elevator and Warehouse Company is entitled to be compensated for the full market value of its leasehold and building improvements thereon as of the date of taking the same, the total value of said leasehold and improvements to be what the interests of said company therein could have been then sold for upon the open market considering all the elements and possibilities whatsoever found to then affect the market value of those interests including but not exclusive of the possibilities of renewal of the lease and of the landlord requiring the removal of the improvements in the event of there being no lease renewal.

4. The Court further concludes that the determination of the fair market value of the leasehold interest of the defendant Almota Farmers Elevator and Warehouse Company in the

land and improvements designated as Parcel A, and the just compensation to be paid for the taking thereof in this proceeding, should not be limited by the bare legal rights possessed by said defendant by virtue of the lease existing as of the date of taking, but said just compensation should be based upon what a willing buyer and a willing seller would have agreed upon as the fair market value for the unexpired term of the leasehold interest on the open market as of the date of taking, consideration being given to the probability or possibility that the leasehold interest would be extended beyond the termination date set forth in the lease agreement, as it may affect the market value.

5. In consideration of the above and upon consideration of the evidence set forth in paragraph 13 of these Findings of Fact, the total sum of $274,625.00 as set forth in the Findings of Fact herein represents the fair market value of the lands and interest designated as Parcel A and said sum is the full, true and reasonable amount of all compensation to be allowed to all persons whomsoever for all damages of whatsoever nature sustained by reason of the taking of the land and interest designated

as Parcel A, and that payment of said sum to the parties entitled thereto shall constitute full settlement of all claims against the United States of America arising out of said taking.

6. The sum of $108,500.00 deposited as estimated just compensation as to Parcel A should be applied upon the aforesaid total amount of just compensation in the sum of $274,625.00, and there should be a deficiency judgment against the plaintiff, United States of America, in the sum of $166,125.00, with interest thereon at the rate of six per cent per annum from the date of entry of judgment as to Parcel A until paid into the registry of the Court.

7. The judgment to be entered in this proceeding as to Parcel A should provide for the right of removal in the defendant of the buildings, structures and improvements, including grain handling equipment and machinery, in the manner set forth in paragraph 11 of these Findings of Fact.

8. All right, title and interest of the Almota Farmers Elevator and Warehouse Company in and to the land designated as Parcel "A" attached hereto vested in the United States of America on May 26, 1967, subject, however, to existing easements for

public roads and highways, public utilities, railroads and pipelines, and free and clear of all charges, interests, claims, taxes, liens and encumbrances whatsoever.

DATED this 1st day of ~~March~~ April, 1969.

/s/ Charles L. Powell
United States District Judge

Copy Received:

/s/ John H. McRae
JOHN H. McRae
Assistant United States Attorney

Presented by:

/s/ Lawrence Hickman
Lawrence Hickman
Attorney for Defendant

EXHIBIT "A"

(legal description of Parcel "A" omitted in printing. See Page 79, Volume I, transcript of record.)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs.	)	Civil Action No. 3021
22.95 ACRES OF LAND, more or less, situate in Whitman County, State of Washington; ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, a Washington corporation, et al., Defendants.	)	JUDGMENT AND DEFICIENCY AS TO PARCEL "A"

[Filed in the U.S. District Court, Eastern District of Washington Apr. 9, 1969, Dorothy E. Moulton, Clerk, LR Deputy]

This matter came on regularly for trial before the Court sitting without a jury at Spokane, Washington, on March 21, 1969. The plaintiff United States of America appeared by John H. McRae and Robert M. Sweeney, Assistant United States Attorneys, and the defendant Almota Farmers Elevator and Warehouse Company, a Washington corporation, appeared by Lawrence Hickman, its attorney of record.

The Court having considered the records on file herein, including the pre-trial Order entered on March 6, 1969 and the stipulation of the parties filed on March 21, 1969, and having on ~~March~~ April DEM 9, 1969 entered Findings of Fact and Conclusions of Law on the issue of the amount of just com-

pensation to be paid for the taking of the land and interest designated as Parcel "A", and the Court having jurisdiction of the parties and of the subject matter of this proceeding, now, therefore

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The plaintiff United States of America had the right under the authority set forth in the complaint herein to condemn for public use the land and interest designated as Parcel "A" and as described in Exhibit "A" attached hereto.

2. The amount of just compensation in the total amount of $274,625.00 as set forth in the Findings of Fact and Conclusions of Law on file herein represents the fair market value of the land and interest designated as Parcel "A" acquired by the plaintiff in this proceeding and the full, true, and reasonable amount of all compensation to be allowed to all persons whomsoever for all damages of whatsoever nature sustained by reason of the taking thereof, and that payment as hereinafter provided shall constitute full settlement of all claims against the United States of America arising out of said taking.

3. The sum of $107,000.00 heretofore pa

as advance compensation pursuant to the Order of this Court entered on August 14, 1967 is hereby applied upon the aforesaid total amount of just compensation. The following is the only person or party having any interest in the compensation to be paid for the taking of Parcel "A", and the Clerk of Court is directed to disburse the balance of the moneys now on deposit in the registry of the Court as to Parcel "A" as follows:

TO: Almota Farmers Elevator and Warehouse Company
c/o Lawrence Hickman
Attorney at Law
E. 116 Spring Street
Colfax, Washington 99111 $1,500.00

4. That a deficiency judgment be and the same is hereby entered against the plaintiff United States of America and in favor of the defendant Almota Farmers Elevator and Warehouse Company in the sum of $166,125.00, with interest thereon at the rate of six per cent per annum from the date of entry of this judgment, namely, ~~March~~ April 9 DEM, 1969, until the amount of the said deficiency is paid into the registry of the Court, and the payment by the plaintiff of said deficiency into the registry of the Court shall constitute full satisfaction of said deficiency judgment. Upon payment of such deficiency judgment into the registry of the Court, the Clerk of Court

is hereby authorized and directed forthwith and without further order of the Court to pay said sum to the defendant Almota Farmers Elevator and Warehouse Company, in care of its aforesaid attorney, in full satisfaction of such deficiency judgment.

5. The defendant Almota Farmers Elevator and Warehouse Company may remove the buildings, structures and improvements, including installed grain handling equipment and machinery which were located on the land designated as Parcel "A" as of the date of taking, provided that the removal of such buildings, structures, and improvements, including installed grain handling equipment and machinery, be effectuated by the defendant on or before September 30, 1969, and that upon removal by the defendant of such buildings, structures, and improvements, including grain handling equipment and machinery, the title thereto shall revest in said defendant, and provided further that in the event such equipment, machinery and improvements are not removed by the defendant on or before September 30, 1969, or such further date as may be agreed upon by the plaintiff and defendant, then the right of removal shall terminate automatically and the United States of America shall have a

good and indefeasible title to such equipment, machinery and improvements as remain without notice to the defendant.

6. All right, title and interest of the Almota Farmers Elevator and Warehouse Company in and to the land designated as Parcel "A" attached hereto vested in the United States of America on May 26, 1967, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines, and free and clear of all charges, interests, claims, taxes, liens and encumbrances whatsoever.

DATED this 1st day of ~~March~~ April, 1969.

/s/ Charles L. Powell
United States District Judge

Entered in Civil Docket on
4/9/69
LR

Copy Received:

/s/ John H. McRae
John H. McRae
Assistant United States Attorney
of Attorneys for Plaintiff

Presented by:

/s/ Lawrence Hickman
Lawrence Hickman
Attorney for defendant

(Ex. "A" omitted in printing)
[Tr. Vol. 1, p. 84]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. 22.95 ACRES OF LAND, more or less, situate in Whitman County, State of Washington; ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, a Washington corporation, et al., Defendants.	Civil Action No. 3021 NOTICE OF APPEAL AS TO PARCEL "A"

[Filed in the U.S.District Court, Eastern District of Washington, May 29, 1969, Dorothy E. Moulton, Clerk, LR Deputy]

NOTICE IS HEREBY GIVEN that the plaintiff United States of America by its attorneys of record does hereby appeal to the Court of Appeals for the Ninth Circuit from that judgment dated April 1, 1969 and entered in the above-entitled Court on April 9, 1969, and from that Order Denying Motion for Amendment of Findings of Fact and Conclusions of Law and Judgment as to Parcel "A" entered on May 20, 1969.

DATED this 29 day of May, 1969.

DEAN C. SMITH
United States Attorney

/s/ John H. McRae
John H. McRae, Assistant U.S. Attorney

/s/ ROBERT M. SWEENEY
Assistant United States Attorney
Attorneys for Plaintiff

SUPREME COURT OF THE UNITED STATES

No. 71-951

ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY,

Petitioner,

v.

UNITED STATES

ORDER ALLOWING CERTIORARI. Filed ---------
April 3, 1972

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ---------- Circuit is granted, and set for oral argument with No. 71-559.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971
No.

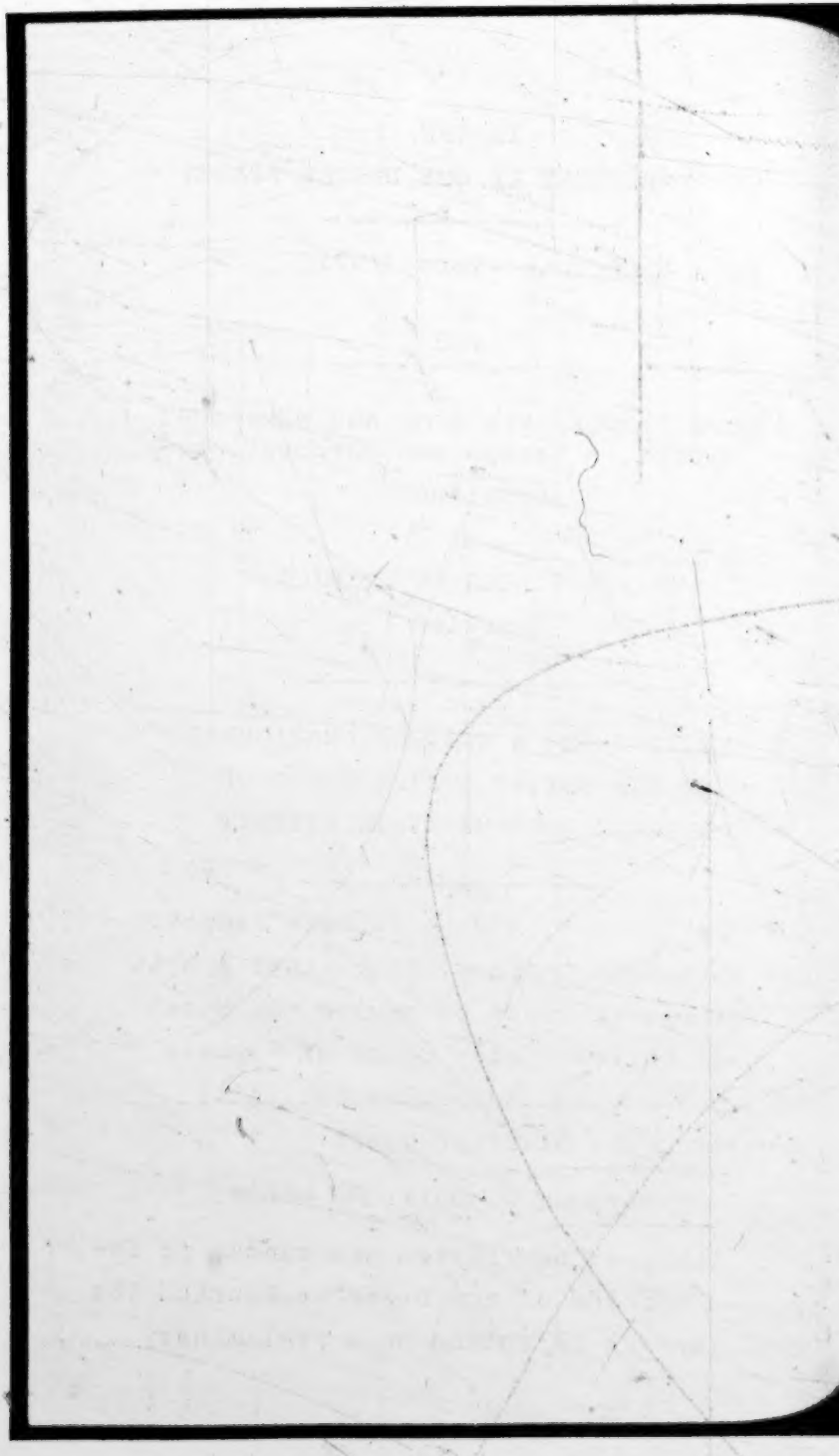
ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, a Washington Corporation,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Almota Farmers Elevator and Warehouse Company, prays that a Writ of Certiorari issue to review the Ninth Circuit United States Court of Appeals judgment entered September 23, 1971, reversing the District Court.

CITATIONS TO OPINIONS BELOW

There is no written memorandum or reported opinion of the District Court. Its oral remarks in ruling on a preliminary



motion to determine the law of the case appear in Appendix A, page 47 with the oral statements made in rendering judgment appearing at page 51 of Appendix A. The Circuit Court opinion is reported in 450 F.2d 125 (Appendix A, p. 32).

JURISDICTION

The Circuit Court judgment was made and entered September 23, 1971, and its order denying a rehearing was entered on December 9, 1971, (Appendix A, p.46). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and that of the District Court under Title 28 U.S. Code 1358.

QUESTION PRESENTED

In awarding just compensation to a tenant in the condemnation of a leasehold interest in real property, including tenant owned building improvements and fixtures situated thereon, may an element of great inherent value in the improvements be excluded merely because it does not, by itself, rise to the status of a legal property right.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution is involved, which states: "nor shall private property be taken for public use, without just compensation."

STATEMENT

On May 26, 1967, the United States filed an action and a declaration of taking in the United States District Court for the Eastern District of Washington, Northern Division, to condemn the leasehold of the Almota Farmers Elevator and Warehouse Company, in 0.75 acre of land owned in fee by the Oregon-Washington Railroad and Navigation Company and situated in a relatively remote area at Almota in Whitman County on the Snake River in Eastern Washington in connection with the Little Goose Lock and Dam project.

The Almota Company had been a tenant of the property under various railroad leases since 1919. The one taken being a 20 year lease expiring October 12, 1974. The land as leased was totally unimproved and of no great value, the rent being $114.20 per year. The tenant erected building im-

provements and installed machinery and equipment all of which was owned by the Almota Company with a right of removal. The improvements taken included three crib grain elevator buildings and a concrete tank of a total grain storage capacity of 522,500 bushels plus a grain warehouse of 63,900 bushels capacity.

No factual dispute exists. The sole issue is one of law as to what inherent elements of value must be considered in arriving at the amount of just compensation under the Fifth Amendment. The value of the leasehold, exclusive of the improvements, etc., was urged by the Government to be the use value of the unimproved premises to the end of the term less the agreed rent of $114.20 per year. That was conceded and is not in issue. But the Government further contended that the same rule should be applied to the valuation of the tenant owned improvements and fixtures plus only their salvage value remaining at the end of the term of the lease, in spite of the admitted facts of the right of removal and that, as between the landlord and the tenant, they were the personal property of the Almota

Company (1), which ownership was in effect a "fee" that would not end with the lease.

The Government further argued that no consideration whatsoever should be given in the valuation of Almota's improvements to any element of value arising from the possibility or probability of a renewal of the lease, enabling their use to continue in place, or to the enhanced value of the premises as a whole arising from the tenant owned leasehold improvements. It thereby sought to acquire the lessee's improvements, etc., (held as personal property but for purposes of condemnation being a part of the real estate) at far less than their actual fair market value (2) although Almota owned

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(1) By the law of the State of Washington (Chung v. Fong Co., 130 Wash. 154) tenant owned building improvements are the personal property of the tenant as between landlord and tenant though for purposes of what the Government must condemn they are part of the real estate. (United States v. Seagren, 50 F.2d 333)

(2) The Government agreed by stipulation that the leasehold and tenant owned improvements, etc., considering all elements of value would in fact sell upon the market at the time of taking for $274,625 whereas under the valuation theory of the Government the value would be limited to $130,000 by excluding all consideration of the probable use of the improvements in place. (Appendix B p. 58 & 59)

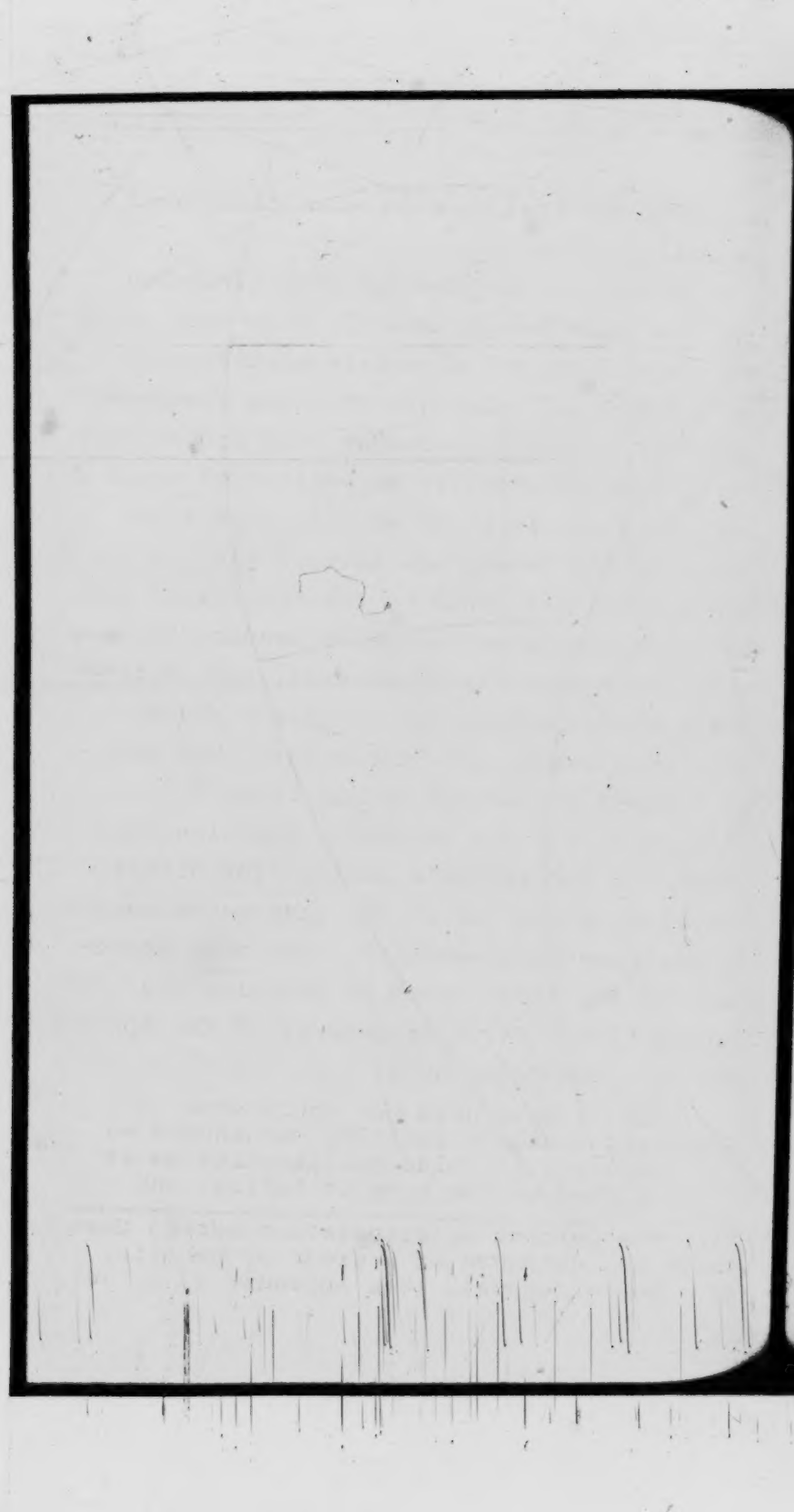
a fee in the improvements when considered as real estate.

Almota argued that it should receive for its improvements exactly what they could have been sold for in a fair market sale considering all elements of value whatsoever inhering in them, including such probability or lack of probability as existed of their continued use in place arising from a renewal of the lease, and further that, since the fee was not owned by the Government and as there was agreed evidence tending to show a great probability of renewal, the improvements should not be valued on the assumption that it was inevitable that they must be removed at the end of the term.(1)

Initially the valuation question was raised by the lessee's motion "for determination of the law of the case on valuation of building improvements". The oral statement of the Trial Court in granting the motion is set forth at page 47 of the Appendix. The Court held:

> "So, I will hold the appraisers in this case are entitled and should be required to value the property as it existed at the time of taking, and

(1) The parties by stipulation agreed that there was evidence of a great probability of a lease renewal. (See Appendix B, p. 56).



the interests of the Almota Company must be valued at what it could be sold for on the open market, taking everything into consideration including the possibility of renewal value of the property in place, and the prospects, if they find prospects, of having the landlord require that the buildings be removed from the property. All of these elements as they find them affecting the Almota Company and the property as of the date of taking."

Thereafter the Trial Court adhered to its position and on April 1, 1969, entered judgment in favor of the Almota Company for $274,625. The oral remarks of the Court in granting judgment are set forth at page 51 of Appendix A.

The fee owner of the premises was never a party to the action. It was urged by Almota, concurred in by the Trial Court, and admitted by counsel for the Government in a Trial Court argument[1] that under the

(1) In argument upon the preliminary motion the following remarks were made between Government counsel and the Court:
Mr. McRae: "....So, your honor, I don't think it defies legal principles to say that it follows that what they are entitled to is the value of their lease, the value of their tenancy, as enhanced by the buildings which they put on the property, which are real property, and here they have the right to remove the buildings, so they are entitled to whatever removal value they had.
The Court: Mr. McRae, on your theory of

unit rule of valuation with the fee owner joined as a defendant the award for the improvements would have necessarily been very substantially greater than the $130,000 valuation contended for by the Government (1).

No testimony was taken. Judgment was entered on April 1, 1969, based upon a stipulation of the parties and the agreed facts in the pre-trial order that the fair market value of the interests of Almota in the land and improvements valued as contended

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the case, on the day before the condemnation action was filed, if the Almota Company had conveyed this property to the railroad company, you would be paying them about five times as much as you are offering them now -- you would be paying the railroad company about five times as much as you are offering them now.
Mr. McRae: On the day before?
The Court: If, on the day before, the landlord and the tenant's interests were merged, before you acquired -- or suppose you acquired -- suppose the railroad company conveyed this [0.75] acres to the Almota Company on the day before the condemnation action, they would have owned this fee and the buildings and the lease, and you would then be paying substantially a greater amount of money, wouldn't you?
Mr. McRae: Yes, your Honor."

(1) In that connection Almota contended and the Trial Court concluded that the amount of just compensation awarded should not be reduced merely because the fee owner was not a party to the action.

for by Almota was the sum of $274,625. It was also stipulated that the value based on the tenant's "bare legal rights", as contended by the Government, was the sum of $130,000. The term "bare legal rights" was used to refer to the contention of the Government that, as Almota had no legal right to a renewal of the lease, no enhanced market value of the improvements arising from any probability of a renewal could be considered.

The Government appealed to the Circuit Court of Appeals for the Ninth Circuit. That Court entered its decision on September 23, 1971, reversing the Trial Court and determining just compensation to be the sum of $130,000 pursuant to the method of valuation contended for by the Government. (Appendix A, p. 32)

The opinion erroneously concludes that the judgment of the Trial Court included compensation for a renewal expectancy of the lease as a compensable property right whereas it was only considered as an element of value inhering in and adding to the market value of the property taken. In its opinion the Circuit Court concedes that the case of Borough of Manhatten, 388 F.2d 596, relied upon by the Trial Court, does support

the position of Almota but it declined to follow that decision in the Ninth Circuit and proceeded to adopt a rule directly in conflict with it.

A petition for rehearing was timely filed in which it was urged that the possibility or probability of a renewal of the lease was an element of value inhering in the tenant owned improvements entitled to consideration the same as are such matters as schools, roads, markets, view, etc., as held by both the Ninth and Tenth Circuits in United States v. Fuller, 2 F.2d 504, and United States v. Jaramillo, 190 F.2d 300, all of which are generally elements of value considered without there being any legal right to their continued existence. The petition was denied on December 9, 1971.

REASONS FOR GRANTING THE WRIT

1. Direct Conflict With Second Circuit

The decision of which review is sought is in conflict with the well established rule of the Second Circuit Court of Appeals as set forth in United States v. 1,132.5 acres of land etc., Upper Allegheny Sand & Gravel Co., 441 F.2d 356, which states at page 358:

"It is well settled in this circuit

that a tenant who has installed fixtures in property condemned by the United States need not content himself with their salvage value when the government has made their continued use in place impossible. See United States vs. Certain Property, etc. (Il Progresso), 306 F.2d 439, 448 (2d Cir. 1962). See also United States v. Certain Property, etc. (Lafayette Nut Product), 344 F.2d 142, 146 (2d Cir. 1965); United States v. Certain Property, etc. (193 Realty Corp.), 388 F.2d 596, 600 (2d Cir. 1968) (en banc). Because these fixtures diminish in value upon removal, a measure of damages less than their fair market value for use in place would constitute a substantial taking without just compensation. '[I]t is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of secondhand machinery and in so doing discharge the full measure of its duty.' Jackson v. State, 213 N.Y. 34, 35, 106 N.E. 758 (1914) (Cardozo, J.)."

The Court below was advised of that rule but it definitely declined to apply it in the Ninth Circuit and proceeded to limit the compensable value of the tenant owned building improvements and fixtures taken to the value of their use for the remainder of the lease plus their salvage value at the end of the term. In so doing, the Court discussed and expressly declined to follow the Second Circuit rule as expressed in the Manhattan Case, (United States v. Certain Property,

388 F.2d 596). The Circuit Court below admits that the rule of the Manhattan case supports the position of Almota and states:

"The District Court in our instant case relied heavily upon the important decision of the Court of Appeals for the Second Circuit, United States v. Certain Property, Borough of Manhattan, 388 F.2d 596 (1968). The opinion in that case does support the contentions of Almota in the instant case. It awards compensation for expectations disappointed by the exercise of the sovereign power of eminent domain, expectations not based upon any legally protected right, but based only, to borrow the language of Justice Holmes in Emery, supra, upon 'a speculation on a chance'. In the Borough of Manhattan case, supra, the Court says '* * an existing tenant usually has the inside track to a renewal for all kinds of reasons - - avoidance of costly alterations, saving of brokerage commissions, perhaps even ordinary decency on the part of landlords * *'. Almota urges that the alchemy performed by the Court in Borough of Manhattan, the conversion of items, which would have weight in the thinking of a speculator, into Fifth Amendment 'property' and thence into dollars, is an introduction of modern realism into the law, to displace dry and tired conceptualism.

We are not persuaded by the Borough of Manhattan, supra, opinion."

Thus there is here a direct conflict on an important constitutional question as to whether just compensation for tenant owned building improvements and fixtures is, as to

their value at the end of the term, to be limited to their salvage value as held by the Ninth Circuit Court below or is to be valued for use in place as held in the Second Circuit. That conflict presently exists and is of recent origin, the Allegheny decision being April 14, 1971, and that of the Court below being September 23, 1971.

There is no reconciliation between the two positions. Both cannot be the law. The United States Constitution is the supreme law of the land. What is just compensation in the one circuit must also be just compensation in the other. Only the United States Supreme Court can now resolve that conflict by granting a review.

2. Apparent Conflicts With Supreme Court

In the valuation of property taken in eminent domain proceedings all elements of value inhering in the property are to be considered. (Olson v. United States, 292 U.S. 246).

In restricting the compensable value (at the end of the term) of the improvements owned by the tenant to their then salvage value and refusing to consider any added market value arising from the possibility or probability of their continued use in place

resulting from a lease renewal, the Court below denied to Almota consideration of one of the elements of value inhering in its legal property rights.

The parties stipulated that the fair market value of the tenant's legal property rights[1] in the leasehold and improvements, etc., was the sum of $274,625 "considering all the elements and possibilities whatsoever found to then affect the market value of those interests including but not exclusive of the possibility of renewal of the lease and of the landlord requiring the removal of the improvements in the event of there being no lease renewal." (Appendix B, pages 57 & 59). However, the Government contended that Almota is entitled to no such element of value. It was further stipulated that the fair market value of those same legal property rights possessed by Almota was the sum of $130,000, if no consideration is "given to any additional value which might have been obtained upon the open market based upon a supposition or ex-

(1) It was agreed that these rights consisted of a leasehold interest in the real estate being for a term ending October 12, 1974, and the ownership of the elevator buildings, machinery, and equipment situated thereon with a right of removal. (Appendix B, p. 55)

pectation that an extension of the defendant's leasehold interest could have been obtained from the lessor at a favorable price." (Appendix B, p. 58,59). The only difference between the two methods of valuation is the inclusion or exclusion of an element of value arising from consideration of the possibility or probability of the tenant owned improvements, etc., continuing to be used in place upon the premises upon the expiration of the term of the lease.

The stipulation necessarily recognizes as a fact that the fair market value of the property is enhanced in the amount of $144,625 by the probability or possibility of that continued use. ($274,625 less $130,000). That very important element of value the Circuit Court below chose to ignore. All compensation therefor was denied upon the ground primarily that the expectancy of renewal is not a compensable property right. No property right is included in the $274,625 stipulated valuation which is not also included in the $130,000 valuation. It is only that the $274,625 valuation includes an element of inherent value excluded in the $130,000 valuation. Thus the decision is in conflict with the rule of the Supreme Court as stated in the Olson Case, supra, 292 U.S.

246) that all elements of value inhering in the property must be considered.

The decision below is also in conflict with the recognized rule of the United States Supreme Court that the owner of property taken must be, by the award of just compensation, placed in the same pecuniary position as if his property had not been taken. (Olson v. United States, 292 U.S. 246; and United States v. Miller, 317 U.S. 369) By the decision of the Court below it is held that $130,000 is just compensation for the very same property rights which by the agreed facts could have been sold in a fair market sale for $274,625. It is ridiculous to contend that the award of $130,000 for property which admittedly could have been sold for $274,625 will place Almota in the same pecuniary position as if its property had not been taken. If Almota's interests in the property could have been liquidated upon the market for $274,625 nothing less can be just compensation.

The ruling of the Circuit Court below is also in conflict with those Supreme Court cases holding that the measure of just compensation under the Constitution is fair market value. (United States v. Miller, 317 U.S. 369; U.S. v. Petty Motor Company, 327

U.S. 372). Here it is admitted by stipulation Almota's property interests had a fair market value of $274,625 if all elements having value upon the market are considered. To deny consideration of an element inhering in the property taken, having value upon the market, is to deny the recovery of the fair market value in violation of the rule of the above cited cases.

3. Apparent Conflicts With Other Circuits

The holding of the Court below that the value of the improvements, etc., at the end of the term of the lease must be restricted to their salvage value is directly in conflic with what clearly appears to have been the result reached by the Washington D.C. Circuit Court of Appeals in United States v. Seagren, 50 F.2d 333, where a very substantial award was made to a tenant for his leasehold improvements where his tenancy apparently was by sufferance only. Under the ruling of the Ninth Circuit Court below a tenant whose lease had already expired could only hope to receive the salvage or removal value of his tenant owned improvements because consideration of any probability of a renewal was denied.

In the Seagren case it is apparent that

far more than salvage value was awarded, as the improvements consisted of such items as buried tanks, concrete surfacing, pipes, etc. The evidence tended to show an original investment by the tenant of $60,000. A recovery of $35,000 was allowed without awaiting any settlement of the controversy as to whether or not the tenant was entitled to any right of tenancy beyond the date of the taking. Full value for the tenant's improvements appears to have been allowed rather than their salvage or removal value thus indicating a direct conflict with the Ninth Circuit Court below.

The decision below also appears to be in conflict with all cases of other circuit courts which apply and follow the unit rule stated in the District of Columbia Circuit Court case of Carlock v. United States, 53 F.2d 926 as follows:

> "The proper rule governing condemnation proceedings in cases of this sort is state in.....104 A. 429,...where the court said: 'in proceedings instituted and to condemn the reversionary interest, as well as the leasehold interest, the rule is to ascertain the entire compensation to be allowed as though the entire title or estate in the property belonged to one person, and then apportion the sum between the holders of the different interests, according to their respective rights.'"

The Court below ignored the unit rule in restricting the value of the tenant owned improvements at the end of the lease term to their salvage value.

The decision below also appears in conflict with cases in the other circuit courts holding that all available uses affecting the market value of the property should be considered. The Court below has refused to consider the probable continued use of the elevator improvements in place upon the leasehold site. That probable use has been agreed by the parties to add $144,625 to the market value of the property condemned ($274,625 minus $130,000). Among other circuit cases allowing the consideration of all probable uses are United States v. 10,291.83 acres of land, etc., 411 F.2d 1081, 6th Circuit; and United States v. 25.406 Acres, Etc., 172 F.2d 990, (4th Cir.)

It appears to have weighed very heavily with the Court below that the probable lease renewal was not secured by a legal right. However, it need only be shown that the use is reasonably probable as stated in the 6th and 4th circuit cases last cited.

It was stipulated that there was evidence available tending to show a great

probability of the renewal of the Almota lease[1] resulting in the agreed market value being $274,625 with its consideration and $130,000 without. (Appendix B, p. 58, 59)[2] Yet, the Court below refused to consider the probability of renewal as an element of value of the improvements taken because it was speculative and it did not rise to the status of a legal property right. Surely, the consideration of the use of a tract of land as an apartment site would not fail merely because the owner presently did not have a building permit if it was reasonably probable one could be obtained.

The decision of the Court below is at variance with the holding in the Tenth

(1) It was agreed evidence was available to the effect that "Railroads generally have not cancelled or refused to renew elevator or warehouse leases so long as the lessee remains in business and is producing freight traffic for the railroad." (Appendix B, p. 56)

(2) The latter valuation was said to be based on the "bare legal rights possessed by the lessee". That reference was used throughout the proceedings in the lower court as synonymous to the manner of valuation urged by the Government under which any element of value arising from the probability of a renewal of the lease was excluded.

Circuit of United States v. Jaramillo, 190 F.2d 300, where the availability and accessibility of Taylor Grazing Act permit lands was allowed to be considered as an element of value in fixing just compensation for other land being taken, even though there was no legal compensable property right in the permit lands nor any legal right to their continued use.(1)

Yet, the lower Court here refused to consider a probable lease renewal as an element of value of the improvements taken because there was no legal right to a renewal.

(1) That case states:

"In determining the adaptability of the lands as a ranch, it was therefore proper to take into consideration the availability and accessibility of the permit land as an appurtenant element of value for ranching purposes, provided that consideration is also given to the possibility that the permits could be withdrawn or cancelled by the Government at any time without constitutional obligation to pay compensation therefor. To this extent, this case is distinguishable on facts from the Cox and Beasley cases where the grazing permits were revoked coincidental with the taking of the fee.

Like schools, roads, markets, water and other appurtenant elements of value, it was proper to take the available and accessible permit lands into consideration in arriving at just compensation for the fee lands taken.* * "

4. Apparent Conflicts With Ninth Circuit Cases

In expressly holding that the expectancy or probability of the renewal of the lease is not an inherent element of value in the property rights taken because Almota had no legal right of renewal, the Court below overlooks its prior recent decision to the contrary in United States v. Fuller, 442 F.2d 504, citing with approval the Tenth Circuit Jaramillo case, supra. The opinion states:

> "The district court instructed the jury as follows: '* * *[R]eference has been made to grazing permits held by the defendants on public land. You are instructed that such permits are mere licenses which may be revoked and are not compensable as such. However, if you should determine that the highest and best use of the property taken is a use in conjunction with those permit lands, you may take those permits into consideration in arriving at your value of the subject land, keeping in mind the possibility that they may be withdrawn or canceled at any time without a constitutional obligation to pay the compensation therefor.'"
>
> * * * * *
>
> "(3) It was, therefore, not improper for the trial court to allow the jury to consider the conjunctive use of the fee and permit lands, so long as the jury was admonished to consider the possibility that the permits might be withdrawn at any time without compensation."

As heretofore pointed out at page 18 the decision of the Court below is in conflict with the unit rule cases. Yet, it has adopted and followed the unit rule in other cases. (Burkhart v. U.S., 227 F.2d 659; United States v. Block, 160 F.2d 604; United States v. Adamant, 197 F.2d 1; and Nicholson v. Weaver, 194 F.2d 804).

A further apparent conflict of the Court below appears from its declining to consider any added value arising from a probability or expectancy of a renewal of the lease because of its conclusion that the matter was uncertain and speculative. Yet, where the market has valued a speculative element, the Court below has previously given it consideration. (Cal-Bay Corporation v. United States, 169 F.2d 15; and Phillips v. United States, 243 F.2d 1). It necessarily follows from the stipulation of the parties that the market did value the excluded element. (Appendix B, p. 58 & 59).

In order to resolve the hereinbefore mentioned conflicts in the Ninth Circuit decisions a suggestion was made in the petition for rehearing for an in banc hearing which was rejected. (Appendix A, p. 46)

5. An Important Undetermined Constitutional Question Of National Importance

The question for consideration upon the requested review involves the manner of determining the just compensation to be awarded for tenant owned building improvements and fixtures. That question is of great importance throughout the entire United States in every condemnation proceeding involving the taking of tenant owned leasehold improvements or fixtures. Eminent domain cases are a constant source of litigation. A large percentage of those involve leaseholds, a substantial number of which have the problem of valuing tenant owned improvements.

The decision below has restricted the award for improvements as of the end of the leasehold term to their salvage value. Should the date of taking coincide with the end of the term no compensation whatsoever would be awarded where the improvements have no salvage value as concrete paving, a drilled well, etc., even though they add great value to the property as a whole and their value cannot be recovered in the condemnation by the fee owner as he does not own them.

No decision heretofore rendered by the

Supreme Court appears to have determined or expressly discussed that question. If the decision below is allowed to stand without review it will be relied upon by the Government to negotiate unjust settlements with other tenant owners of improvements or fixtures or they will be compelled at great expense to litigate the question until such time as this Court decides the matter upon review. It is well known that most eminent domain cases are settled by negotiation without litigation. That would have occurred here but for the dispute as to the elements of value to be considered. It is thus of great importance that the decision below be reviewed now to lay the question at rest, settle the direct and inferential conflicts hereinbefore cited, and establish a rule of law to serve as a guide for all federal agencies and owners of tenant owned leasehold improvements in the future.

The valuation question involved is here squarely presented. It is a constitutional question which must be determined sometime. The Ninth and Second Circuits are now in direct conflict. The Washington, D.C. Circuit has reached

a result that appears to be in direct conflict. The decision below is inferentially contrary to numerous Supreme Court opinions, other circuit court cases, and other decisions of the Ninth Circuit itself. Failure to review the decision now will only result in future additional petitions for consideration. It is better that the question be decided and constitutional justice rendered now before more tenant owners of leasehold improvements are forced to suffer unconstitutional losses of their property.

Moreover, the question at issue can now be decided with a minimum expenditure of time. Should review be granted there is no other question of law or fact determination. The sole question at issue is one of constitutional law which ultimately can only be answered by the United States Supreme Court.

6. An Unconstitutional Confiscation Of Property

This reason is urged to emphasize that this petition is made in good faith for a meritorious cause to prevent the working of a partial unconstitutional confiscation of private property.

It is undisputed that the property the

Government took from Almota on May 26, 1967, was a leasehold interest terminating October 12, 1974, in 0.75 acres of unimproved land owned by the Oregon-Washington Railroad and Navigation Company, together with the tenant owned leasehold improvements and fixtures situated thereon. Compensation for no other property was claimed by Almota nor awarded by the Trial Court.

Exclusive of the leasehold improvements, etc., no dispute exists as to the valuation of the leasehold alone. The only controversy involves the valuation of the tenant owned improvements. Their ownership would continue for the full physical life of the property unrestricted by the term of the lease as Almota owns them without any time limitation. The crux of the question is their value at the end of the term. Almota contended and the Trial Court held that just compensation must include all elements affecting the fair market value including the probability or possibility that the lease would be renewed. The Government disagreed and contended that the value at the end of the term should be limited to salvage value.

The Circuit Court below, in agreeing with the Government, disregarded such cases as Olsen, supra, 292 U.S. 246, holding that all elements of value inhering in the property must be considered. The Court refused to follow the well established rule of the Second Circuit that fixtures taken should be valued at their fair market value for use in place (Allegheny Sand and Gravel, supra, 441 F.2d 356, and Manhattan cited by the Trial Court, 388 F.2d 596); it declined to place Almota in the same pecuniary position (Miller and Olsen, supra, 317 U.S. 369 and 292 U.S. 246); it refused to award the full amount of the fair market value for which Almota could have actually sold its interests (Miller, supra, and United States v. Petty Motor Company, 327 U.S. 372) or consider all reasonable probable uses including the probability of continued use in place (10,291 Acres of Land and 25.406 Acres of Land, supra, 411 F.2d 1081 and 172 F.2d 990); it declined to consider a valuable element not constituting in itself a legal property right (contrary to Jaramillo, supra, 190 F.2d 300, and its own holding in Fuller

supra, 442 F. 2d 504); and the unit rule, providing for the award to the tenant of the enhanced value to the fee arising from the tenant owned improvements, was ignored (Carlock, supra, 53 F. 2d 926; United States v. 2,979.72 Acres of Land, Etc., 235 F 2d 327; and Eagle Lake Improvement Co. v. United States, 160 F. 2d 182).

As a result the Court below awarded compensation of only $130,000 for property interests having an admitted fair market value of $274,625 if all elements whatsoever affecting the market value are considered. $130,000 cannot under any circumstances constitute just compensation for the same property which could have been sold in a fair market sale for $274,625. The result is a real shell game in which Almota now comes up with $130,000 where it formerly had property of a liquidation value on the market of $274,625. And it is told that the award is the equivalent of what it previously owned and further that the probability of the renewal of the lease was not compensable property and was too speculative for consideration even though valued by the market, at $144,625 ($274,625 less

$130,000). But Almota never claimed the ownership of the leasehold expectancy. The only claim was that it was an element adding value upon the market to the property Almota did own.

The Court below valued the tenant owned improvements as though the Government owned the fee at the time of the taking, which it did not, and thus could positively assure that the lease would not be extended at the end of the term. The Government had no legal right which could assure any such result. It should require no citation of authority whatsoever except the Fifth Amendment itself to conclude that the decision below is erroneous as $130,000 cannot possibly be just compensation for property which would sell for $274,625 in a fair market sale.

If constitutional rights are to mean anything, they must be protected and now. Unless a review is granted Almota will suffer a gross miscarriage of justice involving an unconstitutional taking of its property in the amount of $144,625. The decision below, if allowed to stand, will be cited in the future to deny other owners of leasehold improvements their just compensation. That can only be pre-

vented by the granting of this petition for review.

CONCLUSION

This Petition for Writ of Certiorari should be granted to settle both direct and inferential conflicts between the decision of the Court below and the decisions of other circuit courts and of the United States Supreme Court upon an important constitutional question of both present and future national significance, to uphold constitutional property rights, to prevent a gross miscarriage of justice, and to provide a rule of law to serve as a continuing guide in future numerous condemnation cases involving the taking of leasehold improvements.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United STATES OF AMERICA, Appellant, vs.	)	FILED Sep 23 1971 Wm. B. Luck, Clerk
22.93 ACRES OF LAND, MORE OR LESS, SITUATE IN WHITMAN COUNTY, STATE OF WASHINGTON; ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, A WASHINGTON CORPORATION, Appellees.	)	No. 24,757

Appeal fron the United States District Court for the Eastern District of Washington Northern Division

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Before: MADDEN, Judge, United States Court of Claims,* KOELSCH and CHOY, Circuit Judges

MADDEN, J.

This is an appeal from a judgment rendered in the United States District Court in a condemnation action. This Court's jurisdiction of the appeal rests on Title 28 U.S. Code, 1291. The District Court rendered judgment for Almota Farmers Elevator and Warehouse Company, "Almota", in the

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* Honorable J. Warren Madden, Judge of the United States Court of Claims, sitting by designation.

amount of $274,625.00. The United States, the Condemnor, appeals, urging that the judgment should have been in the amount of $130,000.00. These divergent figures were contained in a stipulation entered into by the parties in the District Court proceeding, in which the parties agreed that if Almota's theory of the nature of its compensable interest in the property taken should be adopted by the Court, the just compensation for that interest would be $274,625.00, but if the Government's theory should be adopted, the just compensation would be only $130,000.00.

The condemnation action here under review was brought by the United States on behalf of its Department of the Army, to obtain all right, title and interest of Almota in certain land, which the Government took for the Little Goose Lock and Dam, a river improvement and navigational project on the Snake River below Lewiston, Idaho. The parcel of land in question consists of 0.75 of an acre, located in Whitman County, Washington. The fee title to the land was in the Oregon-Washington Railroad and Navigation Company, (Railroad). The condemnee, Almota had a lease from the Railroad on the 0.75 acre tract and had

built a 522,500 bushel grain elevator and a "flat house" also used for grain and other storage purposes, on the tract. On the date of the taking, May 26, 1967, a 20 year written lease was in force between the Railroad, as lessor, and Almota, as lessee. The expiration date of the lease was October 12, 1974, which meant that the lease had seven plus a fraction more years to run when the taking occurred on May 26, 1967. The lease contained no option giving the lessee a right of renewal of the lease.

Prior to the commencement of the condemnation action here under review, the United States had settled with the fee owner, the Railroad, for the Railroad's interest in the land here in question. We are not advised as to the terms of that settlement. Neither party to this case urges that those terms would be relevant in this case.

In the District Court the Government urged that Almota was entitled only to the fair market value of the use of the land and buildings for the seven year plus remainder of the term of its lease, less the agreed annual rent, plus the value of the buildings for removal or salvage purposes. The amount of the judgment, on this basis, was stipulated, as we have seen, to be $130,000.00.

Almota, in the District Court, urged that it was entitled to receive as just compensation the full fair market value of the use of the land and of the buildings in place as they stood at the time of the taking on May 26, 1967, without limitation of such use to the remainder of the term of the existing lease. As stated above, the parties stipulated that if Almota's contention should be adopted, Almota's judgment should be in the amount of $274,625.00. The District Court adopted Almota's argument and rendered judgment for it in the amount of $274,625.00. The United States then brought the instant appeal.

The Government's computation, limiting Almota's right of recovery to its legally protected interest for the remainder of the term of its written lease, differs so greatly from Almota's computation based upon fair market value, i.e. what a willing buyer would pay to a willing seller, because, in transactions in the market place, traders give weight to facts and circumstances in addition to those recognized and enforced by law. If, for example, a person, A, at about a year previous to the date of taking in this case, had funds available and a desire to acquire a going business, he might

have heard of Almota's grain elevator business. Investigation might have disclosed that it was a very profitable enterprise; that there was a large grain growing area which had become accustomed, over the years, to using Almota's elevator for storage and shipment; that the Railroad, the fee owner of the tract on which Almota's buildings were located was glad to have them there because most of the grain stored in the elevator would ultimately be shipped via the Railroad; that the Railroad, because of these circumstances, charged Almota only a nominal rent of $114.00 per year; that Almota had had, ever since 1919, an uninterrupted succession of leases on the land on which Almota's buildings stood.

A could well have concluded that if he bought Almota's current lease and buildings, so that he would be in possession of the land as the expiration of Almota's 20 year lease approached, and if he, A, was then operating the elevator business satisfactorily, the Railroad would, as it had always done for Almota, grant A a renewal of his lease, and would do the same in similar occasions in the future. Thus it might have seemed to A that the Almota elevator business was as permanent as the Railroad's business. If

a title lawyer warned A that all that A could, with legal certainty, acquire from Almota was the right to occupy the land and use the buildings for the then remaining eight years plus, of the term of the lease, A might well have said that he realized that, but was sure that Almota, in the circumstances, would not sell its lease at a price determined by the lawyer's standard, which price he had computed to be $130,000.00; that if he did not offer more than that he would lose the opportunity to acquire this promising business; and that, all things considered, he had decided to offer Almota $274,625.00 for its interest in the property.

If what we have surmised above had occurred, and A had acquired Almota's interest in the land, and a year later the Government had "taken" that interest from A, A's hope and expectation of carrying on, far into the future, the profitable grain elevator business, would have been completely frustrated. It would be said that he had speculated, and lost, unless he could compel the Government to reimburse him for his loss.

The question which we must answer in the instant case is "Does the word 'property' in the language of the Fifth Amendment of

the Constitution of the United States, '* * nor shall private property be taken for public use, without just compensation,' include hopes and expectations, even those so well grounded that they have a market value?" Lest it be thought that the answer to the question posed above is easy and obvious, we quote the language of the Supreme Court of the United States in Segal v. Rochelle, 382 U.S. 375, 379 (1966).

> [i]t is impossible to give any categorical definition to the word "property", nor can we attach to it in certain relations the limitations which would be attached to it in others.

In Segal, the court interpreted the word "property" as used in Bankruptcy Act, 11 U.S. Code §110(a)(5)" most generously," for the purpose of making available for creditors interests of the bankrupt, even if the enjoyment by him of those interests was to be postponed. In Lines v. Frederick, 400 U.S. 18 (1970), the Court held that $137.28 of "vacation pay" which had accrued but had not yet been paid to a workman, at the time he filed his petition in bankruptcy, was not "property", within the meaning of §70a (5) of the Bankruptcy Act, supra. In so holding, the Supreme Court affirmed this Court's decision in Frederick v. Lines, 425 F.2d 215. The Supreme Court in Lines, 400

U.S. at p. 19 said:

> The most important consideration limiting the breadth of the definition of "property" lies in the basic purpose of the Bankruptcy Act to give the debtor a "new opportunity in life and a clear field for future effort unhampered by the pressure and discouragement of pre-existing debt * *. 1/

Whether the Supreme Court regards the word "property" as used in the Fifth Amendment as being as flexible as that Court has held it to be in Segal, supra, and Lines, supra, and, if it does regard it as flexible, what pressures of policy are exerting themselves in one direction or the other, are crucial questions in our instant case.

We return to the question whether the word "property" in the Fifth Amendment embraces hopes and expectations which have a market value?

In United States v. Petty Motor Co., 327 U.S. 372, (1946), the Court said, p.380, fn. 9:

> The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights.

---

1. In our recent decision in In the Matter of E. V. Moore of California, Inc. Bankrupt, ___ F.2d ____, August 17, 1971, No. 24,493, we discussed the Segal case and the Lines case, both supra.

The Court, in Petty Motor, at p. 376, said that a tenant whose lease contained a "termination by condemnation" clause had no right of recovery when the property was condemned because the "tenant has no right which persists beyond the taking and can be entitled to nothing".

In United States v. Scully, 409 F.2d 1061 (CA 10, 1969), the evidence showed that Scully had extensive land holdings which holdings were leased on an annual basis to numerous tenants. The tenants had no legal right to renewal, but the custom had been to renew them each year. At the condemnation trial there was testimony that because of this custom of renewal, the Scully leases had a market value greater than the value of the one year term and the improvements owned by the tenants. The District Court awarded compensation based upon the tenants' theory. The Court of Appeals reversed, holding that the custom of renewal could not create legal interests extending beyond the express one year term granted by the leases. The Court relied upon Petty Motor Co., supra. It also quoted with approval language of Holmes, J. in Emery v. Boston Terminal Co., 178 Mass. (72, 59 N.E. 763 (1901), as follows:

> Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioner's holding, they could not be taken into account * *. They added nothing to the tenant's legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right.

In Scully, the Supreme Court denied certiorari, 396 U.S. 876. Almota, in its brief says:

> The gist of the argument in the Government's brief appears to be the following statement appearing on pages 4 and 5.
>
> Only vested property rights are compensable. Lessee's mere renewal expectancy, not embodied in a lease, does not rise to the status of a vested property right.

Almota then goes on to say:

> However, the Company (Almota) at no time has claimed compensation for any renewal expectancy as such, nor did the Court (the District Court) make any award for it as a property right in itself. Two principal rights of ownership were claimed (1) ownership of a leasehold interest in the land and (2) ownership of building and machinery.

As to item (1), there is, of course no controversy. The right to occupy the land and use the structures on it for the seven plus years balance of the lease is not disputed and would be paid for by the $130,000.00 sum for which the Government contends. So

the balance of the $274,625.00 sum for which Almota contends hinges, somehow, upon the fact that there were valuable buildings and machinery upon the land. But, of course, the value to Almota of the right to use the buildings and machinery on the land after the expiration of the current lease would depend upon whether Almota would have a right to use the buildings and machinery upon the land, after the expiration of the lease. As far as we are aware, Almota's legal right in its buildings and machinery, after the expiration of the lease, would have been the right to remove them, or to sell them to the railroad or to a successor lessee at a price dictated completely by the purchaser. The disclaimer by Almota in its brief, and the failure to claim, in its pleadings, any compensation for any disappointed renewal expectancy is a by-passing of a route recognized by Almota to be treacherous and unsafe. It would confront the statement, obviously true, of Justice Holmes in Emery, that the "market value" of such an interest would "represent a speculation on a chance, not a legal interest". We find no merit in Almota's argument that, because there were buildings, the issue before us is different from what it would have been if there had been no buildings.

An important case in this Circuit is

Osborne v. United States, 145 F.2d 892, _____(CA 9, 1944) wherein are collected numerous cases involving claims arising out of disappointed expectations resulting from the revocation of various government permits which were legally revocable. Recovery was denied in all the cases.

If the law were to go into the business ofawarding compensation for an expectancy which never materialized, because the sovereign "took" the subject of the expectancy, should, in Scully, supra, e.g., the one year lessees be compensated for the loss of a five year occupancy, a 50 year occupancy, a perpetual occupancy? In our instant case, was the stipulation based upon some actuarial computation such as the prospective life of the buildings and machinery, or the life of the railroad, or upon free-ranging guesswork?

The District Court in our instant case relied heavily upon the important decision of the Court of Appeals for the Second Circuit, United States v. Certain Property, Borough of Manhattan, 388 F.2d 596 (1968. The opinion in that case does support the contentions of Almota in the instant case. It awards compensation for expectations disappointed by the exercise of the sover-

eign power of eminent domain, expectations not based upon any legally protected right, but based only, to borrow the language of Justice Holmes in Emery, supra, upon "a speculation on a chance". In the Borough of Manhattan case, supra, the Court says " * * an existing tenant usually has the inside track to a renewal for all kinds of reasons - - avoidance of costly alterations, saving of brokerage commissions, perhaps even ordinary decency on the part of landlords, * *". Almota urges that the alchomy performed by the Court in Borough of Manhattan, the conversion of items, which would have weight in the thinking of a speculator, into Fifth Amendment "property" and thence into dollars, is an introduction of modern realism into the law, to displace dry and tired conceptualism.

We are not persuaded by the Borough of Manhattan, supra, opinion. We are not aware of any policy such as those which influenced the Supreme Court in the Segal case, supra, and the Lines case, supra, to give certain interpretations to the word property in the Bankruptcy Act, which has a bearing on the meaning of "property" in the Fifth Amendment. The coventional meaning given to the word in Petty Motor Co., supra, and in the ana-

logous situations cited by our court in Osborne v. United States, supra, constitute a body of precedent and tradition on the subject which we think is right. We conclude that the judgment of the District Court is erroneous. We reverse the judgment and remand the case to the District Court with a direction to enter a judgment in favor of the condemnee, Almota Farmers Elevator and Warehouse Company for $130,000.00, each party to bear its own costs.

FILED
Dec 9 1971
Wm. B. Luck,
Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant, v. 22.95 ACRES OF LAND, MORE OR LESS, SITUATE IN WHITMAN COUNTY, STATE OF WASHINGTON: ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, A WASHINGTON CORPORATION, Appellees.	No.24757

Before: MADDEN, Judge, UNITED STATES COURT of CLAIMS, KOELSCH and CHOY, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to recommend against the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc.

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

M. Oliver Koetsch
United States Circuit Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. 22.95 ACRES OF LAND, WHITMAN COUNTY, WASHINGTON; ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, et al, Defendants.	No. 3021

RECORD OF PROCEEDINGS ON MOTIONS

BE IT REMEMBERED:

THAT the hearing on motions for the above-entitled action came on for determination on November 4, 1968, before the Honorable Charles L. Powell, Judge, in the District Court of the United States, for the Eastern District of Washington, Northern Division, Spokane, Washington, the plaintiff appearing by Mr. Robert M. Sweeney and Mr. John H. McRae, Assistant U.S. Attorneys, the defendant appearing by Mr. Lawrence Hickman;

WHEREUPON, the following proceedings were had:

* * * * * * *

"THE COURT: The body of the motion says: 'Defendant landowner moves for an order determining that in the above entitled case the defendant Almota Farmers Elevator and Warehouse Company Incorporated be entitled to be compensated for the full market value of its leasehold and its building improvements thereon as a

unit as of the date of taking, including both of the following (1) market value of the leasehold exclusive of building improvements being the difference between the value of the use and occupancy of the leasehold for the remainder of the term, less the agreed rent to be paid; (2) plus the market value of the building improvements in place on the leased premises for use thereon, without being limited to the value of their use for the remainder of the term.'

Now, as I understand it, there are some limitations, self imposed limitations on the valuation as the landowner would have the valuation witnesses take into consideration the fact that the lease by its terms does expire in 1974. It has always been renewed, and had a history of renewal, and that bothers Mr. Hickman and is one of the things as to which Mr. Hickman and Mr. McRae do not agree.

It is my understanding that in order to put the Almota Farmers Elevator and Warehouse Company in the same position pecuniarily as it was in before the taking, it would be necessary to apply the unit rule, that the property taken is to be valued as of the date of taking. That means that the Almota Company would be entitled to have the property valued as it then was including their lease and including the prospect of renewal, and including the value of the property with the improvements as it then was.

Under the facts in this case it would be necessary to have the appraisers appraise the property as it then existed, deducting therefrom the value of the land itself, the value that goes to the railroad company, and then limit their valuation by

by reason of the possible prospects of renewal, or possible loss of value suffered by virtue of requirements of the landlord that the buildings be removed at the end of the lease.

Now, I believe in giving credit where credit is due, and my law clerk just came up with a case in 388 F(2), decided in 1968, 388 F(2), 596, United States v certain property, Borough of Manhattan; and it is a Second Circuit case, heard in banc on rehearing. All nine judges of the Second Circuit sat, Judge Friendly wrote the opinion. It doesn't pass on whether property is real or personal, but it does pass on the question of what would be taken into consideration in connection with the renewal of a short term lease, and I read this because it does have a bearing on valuations that may be arrived at in this case.

> 'We are unable to follow the panel majority in assuming that tenants under short-term leases will generally not be able to derive any value from their fixtures beyond the expiration of their leases. The contrary is proved not only by common experience but by the record of frequent lease renewals in this very case. Lessors do desire, after all, to keep their property leased, and an existing tenant usually has the inside track to a renewal for all kinds of reasons - - avoidance of costly alterations, saving of brokerage commissions, perhaps even ordinary decency on the part of landlords, thus even when the lease has expired condemnation will often force the tenant to remove or abandon the fixtures long before he would otherwise have had to, as well as deprive him of the opportunity to deal with the landlord or a new tenant - - the only two

people for whom the fixtures would have a value unaffected by the heavy costs of disassembly and reassembly. The condemnor is not entitled to the benefit of assumptions, contrary to common experience that the fixtures would be removed at the expiration of the stated term.'

So, I will hold the appraisers in this case are entitled and should be required to value the property as it existed at the time of taking, and the interests of the Almota Company must be valued at what it could be sold for on the open market, taking everything into consideration including the possibility of renewal value of the property in place, and the prospects, if they find prospects, of having the landlord require that the buildings be removed from the property. All of these elements as they find them affecting the Almota Company and the property as of the date of taking.

I am granting Mr. Hickman's motion, in other words."

* * * * * * * * * *

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	
22.95 ACRES OF LAND, WHITMAN COUNTY, WASHINGTON; ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, et al, Defendants.	)	No. 3021

RECORD OF PROCEEDINGS AT THE TRIAL

BE IT REMEMBERED:

THAT the above-entitled action came regularly on for trial and determination on March 21, 1969, before the Honorable Charles L. Powell, Judge, without a jury, in the District Court of the United States, for the Eastern District of Washington, Northern Division, Spokane, Washington, the plaintiff appearing by Mr. Robert M. Sweeney and Mr. John H. McRae, Assistant U.S. Attorneys; the defendant appearing by Mr. Lawrence Hickman;

WHEREUPON, the following proceedings were had:

* * * * * * * * * * * * *

THE COURT: All right.

Well, gentlemen, consistency is a rare jewel, but I hope to be consistent in this case.

On November 21, 1968, I signed the order granting defendant's motion for determination of loss, which has been copied in principal part, into Paragraph 10 of the present stipulation filed today, and which has been received in evidence.

That ruling, generally, is carried into the pretrial order, which was signed on March 6, 1969, and I propose to adhere to that ruling, and I will state again the reasons for which I do so, and it is that I feel that if I do not recognize the current practice of treatment of these leases as having a more than ordinary probability of renewal, that I would be depriving the defendant landowners of an essential and substantial element of value which they would have if they offered their property, not on the condemnation, but on the open market.

Therefore, I will deny the government's motion to strike Paragraphs 9, 10, and 13; and overrule their objection to my consideration of Paragraphs 7; and grant judgment for the defendant Almota Farmers Elevator and Warehouse Company in the amount of $274,625.00 in accordance with the stipulation.

APPENDIX B

FILED IN THE U. S.
DISTRICT COURT
Eastern District of
Washington
Mar 21 1969
Dorothy E. Moulton,
Clerk
L. R. Deputy

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. 22.95 ACRES OF LAND, etc.; ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, et al., Defendants. ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, a corporation, Stipulating Defendant.	CIVIL NO. 3021 STIPULATION AS TO PARCEL "A"

COMES NOW the plaintiff United States of America, by and through John H. McRae, Assistant United States Attorney, and the defendant Almota Farmers Elevator and Warehouse Company, a corporation, by Lawrence Hickman, Attorney at Law, and in connection with Parcel "A" of the above-captioned proceeding stipulate and agree to the following facts and procedures:

1. This is a civil action commenced by the plaintiff United States of America to acquire title to a certain interest in land designated in this proceeding as Parcel "A", which interest was required for public use by the United States in

connection with the construction of the Little Goose Lock & Dam Project of the Corps of Army Engineers on the Snake River in Whitman County, Washington.

2. Parcel "A" is a parcel of land containing 0.75 of an acre lying within the existing right-of-way of the Oregon-Washington Railroad and Navigation Company in Whitman County, Washington, and said land is more particularly described in Exhibit No. 1 attached to this Stipulation and by this reference made a part hereof.

3. The estate acquired in this proceeding to Parcel "A" is all right, title and interest of the defendant Almota Farmers Elevator and Warehouse Company in and to the land described on attached Exhibit No. 1, subject, however, to existing easements for public roads and highway, public utilities, railroads and pipelines, if any.

4. On May 26, 1967, the United States of America filed a Declaration of Taking in this proceeding and deposited the sum of $108,500.00 as estimated just compensation as to Parcel "A", and thereupon the estate set forth in Paragraph 3 of this stipulation vested in the United States of America. It is agreed that May 26, 1967 is the date of taking in this proceeding as to Parcel "A".

5. On may 26, 1967, the date of taking herein, the interest of the defendant Almota Farmers Elevator and Warehouse Company in the land designated as Parcel "A" was a leasehold interest in said land and the structures and improvements situated thereon, as said interest is set forth in that certain agreement dated March

2, 1955 by and between the Oregon-Washington Railroad and Navigation Company as lessor and the defendant Almota Farmers Elevator and Warehouse Company as lessee. Copies of said leasehold agreement, with amendments, supplements and modifications thereto, are attached to this Stipulation as Exhibit No. 2, and it is hereby agreed that such copies may be admitted in evidence for all pertinent purposes, including the purpose of setting forth the leasehold rights of the defendant Almota Farmers Elevator and Warehouse Company in and to the land designated as Parcel "A".

6. The interest of the defendant Almota Farmers Elevator and Warehouse Company in the land described as Parcel "A" and to the improvements situated thereon is the interest set forth in that certain lease by and between defendant, as lessee, and the Oregon-Washington Railroad and Navigation Company, as lessor, copy of which is identified as plaintiff's Exhibit No. 2 and which provides in pertinent part as follows:

a. The lease term is a period of twenty years commencing October 13, 1954, and expiring October 12, 1974;

b. The property is leased for the purpose of receipt, shipping, storage and handling of grain;

c. The lessee may remove its buildings and improvements at the expiration of the lease, but if the lessee does not do so, they are to become the property of the lessor, who may remove them at lessee's expense.

d. The lease contains no option for renewal.

7. It is stipulated and agreed that there is evidence available to the effect that as of May 26, 1967, the date of taking herein, and for some years prior thereto, the railroad company, as the owner of the fee simple title to lands subject to leasehold interest for grain elevators, was extending the terms of existing leaseholds or granting new leaseholds to former lessees upon the expiration of existing terms on the same or similar terms as the expired leaseholds, that it was generally accepted by lessees of the railroad that such renewals of the leasehold interest could be expected, and that railroads generally have not cancelled or refused to renew elevator or warehouse leases so long as the lessee remains in business and is producing freight traffic for the railroad. It is further stipulated and agreed that there is evidence available to the effect that buyers of leasehold interests in railroad land were paying more for the unexpired term of the leasehold interest sold than the value of the bare legal rights possessed by the lessees under such leasehold agreements.

8. The plaintiff United States of America has contended that any evidence relating to the custom or practice in the community or the policy or practice of the parties relating to the extension of this or similar leases is not pertinent, material or competent, and that the just compensation to be paid for the taking of the defendant's leasehold ingerest, including building improvements, in Parcel "A" should be based upon the fair market value of the legal rights possessed by the defendant by virtue of the lease as of the date of taking, and that no consideration

should be given to any additional value which might have been obtained upon the open market based upon a supposition or expectation that an extension of the defendant's leasehold interest could have been obtained from the lessor at a favorable rental.

9. The defendant Almota Farmers Elevator and Warehouse Company has contended that the just compensation to be paid for the taking of its leasehold interest in Parcel "A" should be based upon what a willing buyer and a willing seller would have agreed upon as the fair market value for the unexpired term of the leasehold interest on the open market as of the date of taking, with consideration being given to the probability or possibility that the leasehold interest would be extended beyond the termination date set forth in the lease agreement, as it may affect market value.

10. The Court has made the following ruling at pretrial: ". . . the defendant, Almota Farmers Elevator and Warehouse Company, Incorporated, is held to be entitled to be compensated for the full market value of its leasehold "and building improvements thereon as of the date of taking the same, the total value of said leasehold and improvements to be what the interests of said company therein could have been then sold for upon the open market considering all the elements and possibilities whatsoever found to then affect the market value of those interests including but not exclusive of the possibilities of renewal of the lease and of the landlord requiring the removal of the improvements in the event of there being no lease renewal."

11. It is further stipulated and agreed

by and between the parties hereto that the buildings, structures and improvements, including installed grain handling equipment and machinery, comprising a part of the realty are no longer required by the plaintiff and that the right to remove said buildings, structures and improvements, including installed grain handling equipment and machinery, may be and hereby is excluded from the proceeding, and right to remove the improvements as aforesaid will be revested in the former owner, PROVIDED that the removal of such buildings, structures and improvements, including installed grain handling equipment and machinery be effectuated by the defendant on or before September 30, 1969, and PROVIDED FURTHER that in the event such equipment, machinery and improvements are not removed by the defendant on or before September 30, 1969, or such further date as may be agreed upon by the plaintiff and defendant, then the right of removal shall terminate automatically, and the United States of America shall have a good and indefeasible title to such equipment, machinery and improvements as remain without notice to the defendant.

12. It is stipulated and agreed that in the event that it is finally determined that the just compensation to be paid to the defendant Almota Farmers Elevator and Warehouse Company for the taking of Parcel "A" should be arrived at in accordance with the contentions of the plaintiff, as set forth in Paragraph 8 of this stipulation, THEN, in that event, the fair market value of the interest of the defendant Almota Farmers Elevator and Warehouse Company in the land and improvements designated as Parcel "A" as of May 26, 1967, and the amount of just compensation payable to the defendant for the taking of the estate con-

demned is the sum of $130,000.00, together with interest as hereinafter provided.

13. On the other hand, it is stipulated and agreed that in the event that it is finally determined that the just compensation to be paid to the defendant Almota Farmers Elevator and Warehouse Company for the taking of Parcel "A" should be arrived at in accordance with the contentions of the defendant, as set forth in Paragraphs 9 and 10 of this stipulation, THEN in that event, the fair market value of the interest of the defendant Almota Farmers Elevator and Warehouse Company in the land and improvements designated as Parcel "A" as of May 26, 1967, and the amount of just compensation payable to the defendant for the taking of the estate condemned is the sum of $274,625.00, together with interest as hereinafter provided.

14. It is stipulated and agreed by and between the parties hereto that the following procedure may be utilized, subject to the approval of the Court, in the trial of this case and in the entry of judgment:

a. The case may proceed to trial before the Court sitting without a jury on the basis of the facts herein stipulated and upon the basis of the admitted facts as set forth in the Pre-Trial Order entered herein on March 6, 1969, namely, Paragraphs 1 through 12 of the Admitted Facts as set forth on pages 2, 3, and 4 of said Order, and on lines 1 through 12 of page 5 of said Order.

b. Neither party admits to the relevancy, materiality or competency of any or all of such facts, although the

truth of such facts may be admitted as hereinabove stipulated.

c. If the Court should determine at said trial that the just compensation to be paid to the defendant Almota Farmers Elevator and Warehouse Company for the taking of Parcel "A" should be arrived at in accordance with the contentions of the plaintiff, as set forth in Paragraph 8 of this stipulation, THEN the Court may enter a judgment determining the just compensation to be paid to the defendant to be the amount of $130,000.00, and it is further stipulated and agreed that in such event the Court should provide that the difference between such amount and the amount paid into the registry of the Court as estimated just compensation shall draw interest at the rate of six per cent (6%) per annum from the date of entry of such judgment until the amount of such deficiency has been paid into the registry of the Court, and further providing that no interest is payable by the United States on such deficiency for any period prior to the date of entry of such judgment.

d. On the other hand, if the Court should determine at said trial that the just compensation to be paid to the defendant Almota Farmers Elevator and Warehouse Company for the taking of Parcel "A" should be arrived at in accordance with the contentions of the defendant as set forth in Paragraphs 9 and 10 of this stipulation, THEN the Court may enter a judgment determining the just compensation to be paid to the defendant to be the sum of $274,625.00, and it is further stipulated and agreed that in such event the Court should

provide that the difference between such amount and the amount paid into the registry of the Court as estimated just compensation shall draw interest at the rate of six per cent (6%) per annum from the date of entry of such judgment until the amount of such deficiency has been paid into the registry of the Court, and further providing that no interest is payable by the United States on such deficiency for any period prior to the date of entry of judgment.

e. The parties hereto reserve all exceptions to the Court's rulings and all rights to an appeal from the judgment of the Court, and in the event of reversal or remand, the terms of this stipulation shall be applicable as herein set forth, including the amount of just compensation payable by the United States of America to the defendant Almota Farmers Elevator and Warehouse Company, and such terms shall prevail in the re-trial of this action or such other further hearings as the Appellate Court may require in accordance with the mandate of such Court.

15. It is further stipulated and agreed by and between the parties hereto that at the time judgment determining just compensation in this proceeding as to Parcel "A" is entered pursuant to this stipulation, whether such judgment be in the amount of $130,000.00 or in the amount of $274,625.00 as hereinbefore provided, then in either event, the plaintiff and the defendant shall file a stipulation that the terms of that certain order entered August 14, 1968, Amending Order of Possession as to Parcel "A", shall be amended so as to provide that the defendant may retain possession of the premises designated as

Parcel "A" for the period March 1, 1969 to September 1, 1969 without the requirement of the payment of rent for such occupancy to the plaintiff, and further providing that the possession of the defendant of said premises be extended to the date of September 30, 1969, also without the payment of rent, and further providing that in the event construction schedules permit and it is agreed by officials of the Corps of Army Engineers that the possession of the defendant of the premises may be extended to November 1, 1969, then in such event that the further extension of possession to November 1, 1969 shall also be without the requirement of the payment of rent on the part of the defendant.

DATED this 20 day of March, 1969.

John H. McRae

John H. McRae
Assistant United States Attorney

Lawrence Hickman

Lawrence Hickman
Of Attorneys for Defendant
Almota Farmers Elevator & Warehouse Co.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-951

ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not issue an opinion. The opinion of the court of appeals (Pet. App. A, pp. 32-35) is reported at 450 F.2d 125.

JURISDICTION

The judgment of the court of appeals was entered September 23, 1971, and a timely petition for rehearing with a suggestion for rehearing *en banc* was

denied on December 9, 1971 (Pet. App. A, p. 46). The petition for a writ of certiorari was filed on January 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon condemnation of a leasehold, a lessee with no right of renewal is entitled to receive as compensation the market value of its improvements without regard to the remaining term of its lease, because of the expectancy that the lease would have been renewed.

STATEMENT

The United States brought this condemnation action to acquire petitioner's leasehold interest in an 0.75-acre parcel at Almota, Whitman County, Washington, in connection with the Little Goose Lock and Dam river improvement and navigation project on the Snake River. The district court entered judgment based on petitioner's theory that it was entitled to receive as compensation the value of its improvements computed without regard to the remaining term of its lease. The court of appeals reversed and, in accordance with the government's contention, directed that judgment be entered based on a value determined with reference to the remaining lease term (Pet. App. A, pp. 32-45).

The pertinent facts are undisputed and are set forth fully in the court of appeals' opinion. The government sought to obtain all rights to the property in issue. Prior to bringing this suit it settled with the fee

owner, the Oregon-Washington Railroad and Navigation Company. The terms of that settlement were not brought out or urged as relevant in the present action. (Pet. App. 33-34.)

Petitioner leased the land from the Railroad under a twenty-year written lease, covering the land only, at an annual rental of $114.20. It had built on the land a 522,500-bushel grain elevator and another, complementary building. Petitioner had no right to renew the lease; it was obligated to remove its improvements within six months of the expiration of the lease term, failing in which the Railroad owned them and could remove them at petitioner's expense. (*Ibid.*; Pet. App. B, p. 55.)

The parties stipulated that petitioner had occupied this land for many years, that a renewal of the existing lease by the Railroad could be expected, and that, as a result, prospective purchasers were willing to pay more for a leasehold interest such as petitioner's than the value of the bare legal rights owned (Pet. App. B, p 56). Petitioner claimed that in these circumstances it was entitled to compensation measured by the remaining useful life of its improvements and what it could expect to sell its leasehold interest for, without limitation on the basis of the remaining lease term. The government contended, on the other hand, that the possibility that petitioner's lease might be renewed was not a proper component in determining just compensation, and that petitioner was entitled to receive only the value of the use of the land and buildings for the remaining lease term, plus the removal value of the buildings. It was agreed that un-

der petitioner's theory it would receive $274,625, while under the government's theory it would receive $130,000. (Pet. App. A, pp. 33-35; Pet. App. B, pp. 56-59.)

The district court sustained petitioner's contentions. The court of appeals reversed. It held that upon condemnation the government must pay only for legal interests, and that a lessee's expectancy that its lease will be renewed is not a compensable legal interest. Since the government's theory covered all petitioner's legal rights, it ordered that judgment be entered on that basis.

ARGUMENT

It is well established that the compensation that the government is required to pay on condemnation is limited to the value of the condemnee's legal rights in the property taken. In *United States* v. *Petty Motor Co.*, 327 U.S. 372, this Court rejected the market value theory which petitioner urges here in denying a claim for additional compensation for the lessees' renewal expectancy. "The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights" (327 U.S. at 380, n. 9). Instead, the Court held, compensation was to be determined solely on the basis of the remaining lease term. Compare *Omnia Co.* v. *United States*, 261 U.S. 502; *Joslin Co.* v. *Providence*, 262 U.S. 668; *Mitchell* v. *United States*, 267 U.S. 451; *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89. The court below correctly applied the rule expressed in *Petty Motor Co.* in sustaining the government's theory, which, as is conceded, fully compen-

sated petitioner for all its legal rights. See also *Scully* v. *United States*, 409 F. 2d 1061 (C.A. 10), certiorari denied, 396 U.S. 876; *United States* v. *677.50 Acres Marion County, Kan. (Clear Creek)*, 420 F. 2d 1136 (C.A. 10), certiorari denied, 398 U.S. 928; *Southern California Fisherman's Ass'n.* v. *United States*, 174 F. 2d 739 (C.A. 9); *Messer* v. *United States*, 157 F. 2d 793 (C.A. 5).

The Court of Appeals for the Second Circuit has expressed a somewhat different view in *United States* v. *Certain Property, Borough of Manhattan*, 388 F. 2d 596, 600-602, where it awarded compensation for fixtures measured by current cost less an allowance for deterioration "computed in the first instance on the basis of useful life and without regard to the term of the particular lease" (*id.* at 601). The court explained that merely because the lessees had short-term leases did not mean that they would not be able "to derive any value from their fixtures beyond the expiration of their leases" (*ibid.*). In effect, the court simply disagreed with the government's computation of an appropriate salvage value for the fixtures when the leases expired. To the extent that the Second Circuit position may be grounded on compensating the lessee for the possibility that his lease might be renewed even though no right of renewal exists, we believe that it is plainly wrong under the teaching of *Petty Motor Co.*

This, we submit, is not a matter which warrants further review at this time. The other courts of appeals have not departed from the rule of *Petty Motor Co.* as a result of the *Borough of Manhattan* decision.

Instead, that decision appears at most to have created an exception applicable only to its special facts. Moreover, a claim was made in the petition for certiorari in the *Scully* case, *supra*, that the Second Circuit's *Borough of Manhattan* decision conflicted with decisions of other courts of appeals. Presumably, the considerations which led the Court to deny the petition in *Scully* also apply here.[1]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1972.

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[1] Conceivably, the Court may wish to delay disposition of this petition pending its decision in *United States* v. *Fuller*, No. 71-559, certiorari granted, January 17, 1972. While we do not believe that the Court's resolution of the question presented in *Fuller* will affect the instant case, there is some similarity in the underlying issues involved.

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REPLY TO QUESTION INVOLVED

The opposition brief incorrectly presents the question as being whether market value of the improvements is to be determined "without regard to the remaining term" of the lease. Petitioner contended and the District Court ruled that both the possibility of renewal and of non-renewal should be considered. [1]

REPLY TO STATEMENT

The government (Brief pp. 2-3) States:

> "The pertinent facts are undisputed and are set forth fully in the court of appeals' opinion. The government sought to obtain all rights to the property in issue. Prior to bringing this suit it settled with the fee owner . . ."

As to any such settlement prior to the action and as to any inference that the government had so acquired the fee, the quotation is positively untrue and grossly misleading. While the Circuit Court opinion

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[1] That the Court ruled on pre-trial and petitioner urged that in determining market value consideration should be given to "all the elements and possibilities whatsoever found to then affect the market value of those interests including but not exclusive of the possibilities of renewal of the lease and the landlord requiring the removal of the improvements in the event of there being no lease renewal."

does so state, it is likewise not supported by the record. That mistake may well be the real reason for the erroneous decision of the Court.

The pre-trial order of the District Court states as a part of the admitted facts

> "5. The parcel of land designated as Parcel "A" consists of 0.75 of an acre located at Almota, in Whitman County, Washington. The fee title to said lands immediately prior to the filing of the Declaration of Taking was in the Oregon-Washington Railroad & Navigation Company . . . ."

This is not a case of the government already owning the fee and having a legal right to refuse to renew the lease. Instead the fee was then owned by the Oregon-Washington Railroad & Navigation Company which had by its conduct and actions given good reason to believe that the lease would be renewed at the end of the term (Pet. App. B. 56). Though the tenant had no legal right to a renewal, neither did the government have a legal right to deny a renewal. It was, therefore, found by the District Court to be proper in the valuation of the buildings and improvements (the ownership of which did not terminate with the end of the term) to consider the probabilities of both the renewal and nonrenewal of the lease as they affected the market value.

REPLY TO ARGUMENT

The case of the United States v. Petty Motor Co., 327 U.S. 372, is heavily relied upon by the government and is cited as having "rejected the market value theory". On the contrary the opinion affirms the fixing of just compensation on the basis of market value as follows:

> "[5-7] The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so called "market value."

Neither does the case hold that the valuation of tenant owned building improvements must "be determined solely on the basis of the remaining lease term". No tenant owned buildings were there involved. They were all owned by the landlord.

The parties stipulated that the tenant was the legal owner of the buildings. Also, considering all elements of value and that they might or might not have to be removed at the end of the term the agreed market value was $274,625.00. (Pet. App. B. 59).

That award is not contrary to the Petty Case as the market value so agreed upon includes only the value of legal rights

actually owned consisting of a term of years in the land and an ownership of buildings not limited to the lease term. The value of nothing else was included.

In commenting upon the Borough of Manhattan Second Circuit case, 388 F. 2d 596, the government asserts that the decision merely refers to a determination of appropriate salvage value. Reference to a subsequent decision of the same Court makes clear that no such valuation is intended and that the rule adopted is in fact in direct conflict with the Circuit Court decision in this case as the Second Circuit has adopted an "in place" value not a salvage value.

> "It is well settled in this circuit that a tenant who has installed fixtures in property condemned by the United States need not content himself with their salvage value when the government has made their continued use in place impossible. . . . . because these fixtures diminish in value upon removal, a measure of damages less than their fair market value for use in place would constitute a substantial taking without just compensation." United States v. 1,132.50 acres of land, Etc. Allegheny Sand & Gravel, 411 F. 2d 356.

In essence the government's argument is confined to the merits of the Circuit Court decision. Nothing is presented contrary to petitioner's contentions that that decision

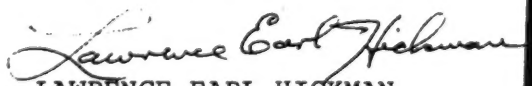
is in direct conflict with the decisions of the Second Circuit and in apparent conflict with those of the Supreme Court, other Circuit Courts, and of the Ninth Circuit itself. Nor is it denied that the question involved is a constitutional question of national importance.

The petition and the brief in opposition, though duly considered, do not constitute a hearing upon the merits. The immediate issue is whether this case should be so heard.

CONCLUSION

The uniformity of constitutional law and the protection of constitutional rights necessitate the granting of the petition and the hearing of this matter upon the merits.

Respectfully submitted,



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. 71-951

ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, a Washington Corporation,

Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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OPINIONS BELOW

There is no written memorandum or reported opinion of the District Court. Its oral remarks in ruling on a preliminary motion to determine the law of the case appear in Appendix A, page 47, of the petition. The oral statements made in rendering judgment appear at page 51 of the same Appendix. The Circuit Court opinion is reported in 450 F. 2d 125 (App. A, p. 32 of the petition).

JURISDICTION

The Circuit Court judgment was made and entered September 23, 1971, and its order denying a rehearing was entered on December 9, 1971, (App. A, p.46, of the petition). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and that of the District Court under Title 28 U.S. Code 1358.

QUESTION PRESENTED

In awarding just compensation to a tenant in the condemnation of a leasehold interest in real property, including tenant owned building improvements and fixtures situated thereon, may an element of great inherent value in the improvements be excluded merely because it does not, by itself, rise to the status of a legal property right.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states: "nor shall private property be taken for public use, without just compensation."

84 Stat. 1821, 33 U.S.C.A. 595a, provides:

"In all cases where real property

shall be taken by the United States . . . in connection with any improvement of rivers, . . . the compensation to be paid for real property taken . . . shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, . . . The compensation defined herein shall apply . . . to the determination of just compensation in any condemnation suit pending on December 31, 1970."

STATEMENT

On May 26, 1967, the United States filed an action and a declaration of taking in the United States District Court for the Eastern District of Washington, Northern Division, to condemn the leasehold of the Almota Farmers Elevator and Warehouse Company, in 0.75 acre of land owned in fee by the Oregon-Washington Railroad and Navigation Company and situated in a relatively remote area at Almota in Whitman County in Eastern Washington for the Little Goose Lock and Dam, a river improvement and navigation project on the Snake River.

The Almota Company had been a tenant of the property under various consecutive railroad leases since 1919. The one taken being a 20 year lease expiring October 12,

1974, which contained no renewal option. The land as leased was totally unimproved and of no great value, the rent being $114.20 per year. The tenant erected building improvements and installed machinery and equipment all of which was owned by the Almota Company with a right of removal. That ownership was not limited to the term of the lease. Treated as real estate it amounted to a fee interest in the improvements. The buildings taken included three crib grain elevator buildings and a concrete tank of a total grain storage capacity of 522,500 bushels plus a grain warehouse of 63,900 bushels capacity.

No factual dispute exists. The sole issue is one of law as to what inherent elements of value must be considered in arriving at the amount of just compensation under the Fifth Amendment and of fair market value based upon all uses to which the condemned property may reasonably be put. The value of the leasehold, exclusive of the improvements, etc., was urged by the Government to be the use value of the unimproved premises to the end of the term less the agreed rent of $114.20 per year. That was con-

ceded and is not in issue. But the Government further contended that the same rule should be applied to the valuation of the tenant owned improvements and fixtures plus only their salvage value remaining at the end of the term of the lease, in spite of the admitted facts of the right of removal and that, as between the landlord and the tenant, they were the personal property of the Almota Company[1] which ownership was in effect a "fee" that would not end with the lease.

The Government further argued that no consideration whatsoever should be given in the valuation of Almota's improvements to any element of value arising from the possibility or probability of a renewal of the lease (enabling their use to continue in place) or to the enhanced value of the premises as a whole arising from the tenant owned leasehold improvements. It thereby sought to acquire the lessee's improvements, etc. (held as personal pro-

(1) By the law of the State of Washington (Chung v. Fong Co., 130 Wash. 154) tenant owned building improvements are the personal property of the tenant as between landlord and tenant though for purposes of what the Government must condemn they are part of the real estate. (United States v. Seagren, 50 F. 2d 333)

perty but for purposes of condemnation being a part of the real estate) at far less than their actual fair market value[1] although Almota owned a fee in the improvements when considered as real estate.

Almota argued that it should receive for its improvements exactly what they could have sold for in a fair market sale considering all elements of value whatsoever inhering in them, including such probability or lack of probability as existed of their continued use in place arising from a renewal of the lease, and further that, since the fee was not owned by the Government and as there was agreed evidence tending to show a great probability of renewal, the improvements should not be valued on the assumption that it was inevitable that they must be removed at the end of the term.[2]

(1) The Government agreed by stipulation that the leasehold and tenant owned improvements, etc., considering all elements of value would in fact sell upon the market at the time of taking for $274,625 whereas under the valuation theory of the Government the value would be limited to $130,000 by excluding all consideration of the probable use of the improvements in place. (App. 29-30).
(2) The parties by stipulation agreed that there was evidence of a great probability of a lease renewal. (App. 25).

Initially the valuation question was raised by the lessee's motion "for determination of the law of the case on valuation of building improvements" (App. 4). The oral statement of the Trial Court in granting the motion is set forth in Appendix A of the petition at page 47. The Court held:

> "So, I will hold the appraisers in this case are entitled and should be required to value the property as it existed at the time of taking, and the interests of the Almota Company must be valued at what it could be sold for on the open market, taking everything into consideration including the possibility of renewal value of the property in place, and the prospects, if they find prospects, of having the landlord require that the buildings be removed from the property. All of these elements as they find them affecting the Almota Company and the property as of the date of taking."

Thereafter the Trial Court adhered to its position and on April 1, 1969, entered judgment in favor of the Almota Company for $274,625. The oral remarks of the Court in granting judgment are set forth at page 51 of Appendix A of the petition.

The fee owner of the premises was never a party to the action. It was urged by Almota, concurred in by the Trial Court,

and admitted by counsel for the Government in a Trial Court argument[1] that under the unit rule of valuation with the fee owner joined as a defendant the award for the improvements would have necessarily been very substantially greater than the

(1) In argument upon the preliminary motion the following remarks were made between Government counsel and the Court:
Mr. McRae: "....So, your honor, I don't think it defies legal principles to say that it follows that what they are entitled to is the value of their lease, the value of their tenancy, as enhanced by the buildings which they put on the property, which are real property, and here they have the right to remove the buildings, so they are entitled to whatever removal value they had.
The Court: Mr. McRae, on your theory of the case, on the day before the condemnation action was filed, if the Almota Company had conveyed this property to the railroad company, you would be paying them about five times as much as you are offering them now -- you would be paying the railroad company about five times as much as you are offering them now.
Mr. McRae: On the day before?
The Court: If, on the day before, the landlord and the tenant's interests were merged, before you acquired -- or suppose you acquired -- suppose the railroad company conveyed this [0.75] acres to the Almota Company on the day before the condemnation action, they would have owned this fee and the buildings and the lease, and you would then be paying substantially a greater amount of money, wouldn't you?
Mr. McRae: Yes, your Honor."

$130,000 valuation contended for by the Government[1].

No testimony was taken. Judgment was entered on April 1, 1969, based upon a stipulation of the parties (App. 22) and the agreed facts in the pre-trial order (App. 9) that the fair market value of the interests of Almota in the land and improvements valued as contended for by Almota was the sum of $274,625. It was also stipulated that the value based on the tenant's "bare legal rights", as contended by the Government, was the sum of $130,000. The term "bare legal rights" was used to refer to the contention of the Government that, as Almota had no legal right to a renewal of the lease, no enhanced market value of the improvements arising from any probability of a renewal could be considered.

The Government appealed to the Circuit Court of Appeals for the Ninth Circuit. That Court entered its decision on September 23, 1971, reversing the Trial Court and determining just compensation to be the

(1) In that connection Almota contended and the Trial Court concluded that the amount of just compensation awarded should not be reduced merely because the fee owner was not a party to the action.

sum of $130,000 pursuant to the method of valuation contended for by the Government. (App. A of the petition at p. 32).

The opinion erroneously concludes that the judgment of the Trial Court included compensation for a renewal expectancy of the lease as a compensable property right whereas it was only considered as an element of value inhering in and adding to the market value of the property taken. In its opinion the Circuit Court concedes that the case of Borough of Manhatten, 388 F. 2d 596, relied upon by the Trial Court, does support the position of Almota but it declined to follow that decision in the Ninth Circuit and proceeded to adopt a rule directly in conflict with it.

Although there is nothing in the record that the Government had acquired the fee title or settled with the fee owner prior to bringing the action, nevertheless, the Circuit Court erroneously found as a fact that the Government had settled with the fee owner prior to the suit. Conceivably from the erroneous finding the Court could have concluded that the Government did have a legal right at the time of the taking to refuse to renew the lease and

hence the improvements and fixtures must be valued only for their salvage or removal value at the end of the term whereas the Government, in fact, had no such legal right as it had not settled with the fee owner prior to the action.(1)

A petition for rehearing was timely filed in which it was urged that the possibility or probability of a renewal of the lease was an element of value inhering in the tenant owned improvements entitled to consideration the same as are such matters as schools, roads, markets, views, etc., as held by both the Ninth and Tenth Circuits in United States v. Fuller, 442 F. 2d 504, and United States v. Jaramillo, 190 F. 2d 300, all of which are generally elements of value considered without there being any legal right to their continued existence. The petition was denied on December 9, 1971.

(1) The pre-trial order states (App. 11): "The fee title to said lands immediately prior to the filing of the Declaration of Taking was in the Oregon-Washington Railroad and Navigation Company * * * ."

SUMMARY OF ARGUMENT

By statute (84 Stat.1821, quoted at page 2 herein), by the stipulation of the parties, and by the substantially unanimous holding of the cases the amount of just compensation to be awarded is the fair market value at the time of taking of the property taken. Although the parties stipulated to two greatly different values both were for the very same identical property, being the "interest of * * * Almota * * * in the land and improvements" taken. That interest is recognized to be a leasehold interest in the unimproved land to the end of the lease term plus the full "fee" ownership of the elevator facilities erected by Almota thereon, subject to removal at the end of the term in the event the lease is not renewed (App. 11-13).

The fair market value of Almota's interest "in the land and improvements" at the time of taking was fixed by stipulation at $274,625 (App. 29-30) considering all the elements and possibilities whatsoever found to then effect the market value of those interests including but not exclusive of the possibilities of renewal of the lease and of the landlord requiring the removal of the improvements in the event of there being no lease re-

newal" (App. 27).

The lesser value of $130,000 arrived at as urged by the Government is reached by eliminating from the determination of market value all consideration of any element of value arising from the probable renewal of the lease at the end of the term thereby eliminating from consideration the continued use of the improvements in place as a reasonably probable use to which the property could then be put. That contention is contrary to the well established rule of the Second Circuit Court of Appeals that tenant owned fixtures should be valued at their market value for use in place, Allegheny Sand and Gravel Case, 411 F.2d 356. The Washington, D.C. Circuit appears to have reached the same result in the Seagren case (50 F.2d 333) where concrete paving and building improvements were taken. The Government's position is also contrary to the unit rule cases, to the rule that all probable uses and elements of value must be considered, and to the rule that the owner must be placed in the same pecuniary position as to the time of the taking.

While the Government is not required to pay for interests in property which do

not constitute legal property rights, nevertheless, in their valuation all elements affecting fair market value must be considered even though they do not, alone and by themselves, rise to the status of compensable legal property. Many such elements of value are constantly so considered such as roads, schools, transportation facilities, views, surrounding neighborhoods, etc. Although Almota owned no legal right assuring a renewal of the lease and the continued use of the property in place neither did the Government own any legal right which would assure that the lease would not be renewed. The continued use of the property in place was one of the probable uses to which it could reasonably be put at the end of the lease term.

Almota should be placed in the same pecuniary position as before the taking when its property would sell for $274,625. That is far less than would have been awarded under the unit rule with the fee owner a defendant. Compensation should not be affected to any extent by the joinder or nonjoinder of the fee owner.

Property taken is worth what it will sell for in a fair market sale. If Almota's property would sell for $274,625 nothing less is just compensation.

ARGUMENT

Where a market value exists the cases are substantially unanimous in holding that fair market value at the time of taking is the just compensation required by the Fifth Amendment. (United States v. Miller, 317 U.S. 369; United States v. Petty Motor Company, 327 U.S. 372; Olson v. United States, 292 U.S. 246; Brooks-Scanlon Corp. v. United States, 265 U.S. 106).

Fair market value is also required by statute, 84 Stat. 1821, 33 U.S. C.A. 595a, (quoted herein at p. 2).

The stipulation (App. 27-30) of the parties rests upon fair market value. Whether just compensation is here the fair market value is not an issue. The elements of value and uses of the property entitled to consideration in determining that value are in dispute.

The parties stipulated (App. 29) that the fair market value of the property is $130,000 if valued in the manner urged by the Government and the sum of $274,625 (App. 29-30) if determined according to the contentions of Almota. Paragraph 12 states "in the event * * * just compensation * * * should be arrived at in accor-

dance with the contentions of plaintiff * * * the fair market value of the interest of * * * Almota * * * in the land and improvements * * * is the sum of $130,000 * * * * ". Paragraph 13 in identical language states "in the event * * * just compensation * * * should be arrived at in accordance with the contentions of defendant * * * the fair market value of the interest of * * * Almota * * * in the land and improvements * * * is the sum of $274,625 * * * * ".

No dispute exists as to the property valued. In each instance, it is "the interest of * * * Almota * * * in the land and improvements". The contention that the District Court in accepting the $274,625 valuation was somehow valuing property which Almota did not own and had no legal right to is consequently a myth. The higher amount does not purport to include the valuation of any legal property right not included in the $130,000 valuation. The pre-trial order discloses that Almota's interest in "the land and improvements" consisted of a lease (App. 11-12) of the bare unimproved land for a twenty year term expiring October 12, 1974, plus the full ownership (App. 13) of the building improvements, machinery, and equipment

thereon with a right of removal. Paragraph 9 of the admitted facts (App. 12) sets forth that the buildings consisted of 3 wood crib elevators of the capacities of 126,485, 125,290, and 122,265 bu. plus a concrete tank of 148,460 bu. capacity and a wooden flathouse also used for grain and other storage.

The difference between the two valuations does not arise from any difference in the legal property rights valued. It arises from the elimination in the lower value of consideration of some reasonably probable uses to which the property might be put at the end of the lease term which constitute very substantial elements of value inhering to the property. Eliminated is all consideration of the reasonable probability of continuing the use of the buildings in place upon the leased premises.

Under the theory of the Government, as adopted by the Circuit Court, at the end of the lease term the only uses of the property considered was their use for removal or salvage purposes. The effect is to restrict the value solely to salvage as there would seem to be no reasonable possibility of economically moving

the physical structures to a new location even if a suitable site was found. Thus at the end of the term continued use in place is the highest and best use. The $144,625 difference in the two valuations clearly points that out.

As to the uses to which the buildings might reasonably be put at the end of the term it was stipulated (App. 25) that there was available evidence " * * * that railroads generally have not cancelled or refused to renew elevator or warehouse leases so long as the lessee remains in business and is producing freight traffic for the railroad." Almota obtained numerous consecutive lease renewals since the commencement of its tenancy in 1919 (App. 6). Both by case law[1] and by statute (84 Stat. 1821, quoted herein at p. 2) all probable uses to which the property might reasonably be put must be considered in determining fair market value.

(1) United States v. Benning, 330 F.2d 527 (C.A. 6); United States v. 10,291.83 acres of land, etc., 411 F.2d 108 (C.A. 6); McCandess v. United States, 298 U.S. 342; Olson v. United States, 292 U.S. 246.

It appears that use of the improvements in place at the end of the term is a reasonably probable use to which the property could then be put and which should be considered to whatever extent it may affect the market value (App. 25). The difference in the two stipulated values indicates that the market considered such a use to be almost a certainty. The lack of an absolute right to continued use in place is no justification for disregarding that reasonably probable use where the Government had no legal right to prevent it. If only elements of value constituting legal rights are entitled to consideration then removal value should have also been eliminated as there is nothing in the record or in the facts to the effect that Almota had any legal right to any site to which the buildings could have been moved.

In addition to the statute already quoted (p. 2) numerous cases exist to the effect that all uses to which the property may reasonably be put, all elements of value, and all matters which would be considered by prudent buyers and sellers in the market must be considered.

> "In compensation cases, the market value of the property is to be fixed with consideration of ALL its available uses." (Phillips v. United

States, supra, 243 F. 2d 1, 9th Cir.)

" * * * the market value of the property is to be fixed with due consideration of all its available uses." (United States v. Miller, 317 U.S. 369).

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as any sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what it is worth from its availability for valuable uses." (Boom Co. v. Patterson, 98 U.S. 403).

" * * * the highest and best use of the property can be based upon reasonable future probability * * *. All considerations that might fairly be brought forward and given substantial weight in bargaining between an owner willing to sell and a purchaser desiring to buy should be considered and taken into account." (United States v. 10,291.83 acres of land, etc., 411 F. 2d 1081, 6th Cir.)

"But the Commission, in determining market value, was not confined to consideration of present use. As we suggested in our earlier opinion as it has been quoted here, highest and best use of the land can be based upon reasonable future probability." (United States v. Benning, 330 F. 2d 527, 6th Cir.)

" * * * the market value must be estimated. In respect of each item of property that value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. Brooks-Scanlon Corp. v. United States, 265 U.S. 106." (Olson v. United States, 292 U.S. 246).

It would be naive to assume that in the fixing of both the $130,000 and the $274,625 valuations by the stipulation of the parties that they refrained from considering numerous elements of value not rising to the status of legal rights such as prospective competition, expectations of favorable road conditions and freight rates, the continued raising of grain and peas by farmers of the area, the extent to which farmers may build their own farm storage, etc. Almota owned no legal right to the favorable continued existence of any of those matters, each of which would have some effect upon the market value. For example, the record contains nothing to the effect that Almota owned any farmland, grain, or peas or legal right to assure the continued delivery of such products for

handling and storage. By the agreed provisions of the pre-trial order that was the highest and best use (App. 13).

Carrying the argument of the Government to its ultimate extreme, the leasehold and the improvements should have been determined to be virtually worthless on the date of taking as no legal right was owned by Almota which would guarantee a single pound of wheat or peas being delivered. A change in economic conditions over which Almota had no legal right of control could produce just such a result. Highly improbable! So is the nonrenewal of the lease in question and the termination of the continued use of the property in place. The Government has considered the reasonably probable continued demand for the use of the property for handling and storage without there being any legal right to assure such continued demand, but it would deny consideration of the reasonably probable continued use of the facilities in place because there is no legal right to a lease renewal, thereby disregarding the quoted cases and statute requiring the consideration of all reasonably probable uses and elements affecting the market value.

In the valuation of property courts are constantly giving consideration to elements affecting market value which do not constitute legal property rights, such as views, the proximity and location of highways, schools, shopping areas, parks, the availability of transportation facilities, etc. No property is valued strictly without any consideration of many matters over which the property owner has no legal control. Ownership of the most valuable building in Washington, D.C. would not be worth a wooden nickel if no one lived within a thousand miles and there was no reasonable prospect of anyone moving there. Yet, the legal rights would be the same. One must have a legal property right in what is taken to be entitled to compensation. But, once having that, all elements of value which inhere in and affect its value need not be legally enforceable rights so long as they are reasonably probable and are valued by the market. In the leasehold improvements Almota owned a property right which did not end with the term of the lease. In that property the lease renewal expectancy was an inherent element affecting their fair market value and entitled to consideration. To the extent that it actually does so, its failure

to rise to the status of a legal property right is immaterial.

The Jaramillo (1) and Fuller cases so hold, United States v. Jaramillo, 190 F. 2d 300 (C.A. 10); United States v. Fuller, 442 F.2d 504 (C.A. 9), hearing on Certiorari pending. In both of those cases the availability and accessibility of Taylor Grazing Act permit lands was allowed to be considered as an element of value in fixing just compensation for other land being taken, even though there

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(1) That case states:

"In determining the adaptability of the lands as a ranch, it was therefore proper to take into consideration the availability and accessibility of the permit land as an appurtenant element of value for ranching purposes, provided that consideration is also given to the possibility that the permits could be withdrawn or cancelled by the Government at any time without constitutional obligation to pay compensation therefor. To this extent, this case is distinguishable on facts from the Cox and Beasley cases where the grazing permits were revoked coincidental with the taking of the fee.

Like schools, roads, markets, water and other appurtenant elements of value it was proper to take the available and accessible permit lands into consideration in arriving at just compensation for the fee lands taken * * *".

was no legal compensable property right in the permit lands nor any legal right to assure their continued use. Numerous cases had previously held that Taylor Grazing Act permits do not constitute compensable property rights, Osborne v. United States, 145 F. 2d 892 (C.A. 9); U.S. v. Cox (C.A. 10).

The Second Circuit Court of Appeals has by a number of cases adopted the rule that in the taking of a tenant's fixtures just compensation is their fair market value for use in place. No reason appears or is urged that that same rule is not equally applicable to Almota's elevator facilities. Yet, the Ninth Circuit Court has expressly declined to follow that rule in its decision below although admitting that the rule does support Almota's position (App. 44).

The recent Second Circuit case of the United States v. 1,132.5 acres of land, etc. Upper Allegheny Sand & Gravel Co. 411 F.2d 356, states at page 358:

> "It is well settled in this circuit that a tenant who has installed fixtures in property condemned by the United States need not content himself with their salvage value when the government has made their con-

tinued use in place impossible. See United States vs. Certain Property, etc. (Il Progresso) 306 F.2d 439, 448 (2d Cir. 1962). See also United States v. Certain Property, etc. (Lafayette Nut Product), 344 F.2d 142, 146 (2d Cir. 1965); United States v. Certain Property, etc. (193 Realty Corp.), 388 F.2d 596, 600 (2d Cir. 1968) (en banc). Because these fixtures diminish in value upon removal, a measure of damages less than their fair market value for use in place would constitute a substantial taking without just compensation. '[I]t is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of secondhand machinery and in so doing discharge the full measure of its duty.' Jackson v. State, 213 N.Y. 34, 35, 106 N.E. 758 (1914) (Cardozo, J.)"

The reasoning in support of the rule is set forth in the Borough of Manhattan case, 388 F. 2d 596, which was relied upon by the District Court in quoting the following:

"We are unable to follow the panel majority in assuming that tenants under short-term leases will generally not be able to derive any value from their fixtures beyond the expiration of their leases. The contrary is proved not only by common experience but by the record of frequent lease renewals in this very case. Lessors do desire, after all, to keep their property leased, and an existing tenant usually has the

inside track to a renewal for all kinds of reasons - - avoidance of costly alterations, saving of brokerage commissions, perhaps even ordinary decency on the part of landlords, thus even when the lease has expired condemnation will often force the tenant to remove or abandon the fixtures long before he would otherwise have had to, as well as deprive him of the opportunity to deal with the landlord or a new tenant - - the only two people for whom the fixtures would have a value unaffected by the heavy costs of disassembly and reassembly. The condemnor is not entitled to the benefit of assumptions, contrary to common experience, that the fixtures would be removed at the expiration of the stated term."

In United States vs. Seagren, 50 F. 2d 333, Wash. D.C. cir., full compensation appears to have been awarded to a tenant for his building improvements in spite of the fact that the landlord was then contending that the lease had expired. Included was a gasoline filling station, a work shop, storage tanks, concrete paving, and an iron fence. No compensation was awarded for the leasehold itself. The obvious answer is that the tenant owned improvements were not valued as a part of the leasehold. The award was in addition to the leasehold at their

apparent market value in place.

It should be observed that the valuation rule urged by Almota and adopted by the District Court is more favorable to the government than the above stated rule in that the above rule appears to require an in place value regardless of the probabilities of the renewal or nonrenewal of the lease whereas the rule as applied by the District Court allows the market to weigh that probability or lack of probability. The Court stated:

> "So, I will hold the appraisers in this case are entitled and should be required to value the property as it existed at the time of taking, and the interests of the Almota Company must be valued at what it could be sold for on the open market, taking everything into consideration including the possibility of renewal value of the property in place, and the prospects, if they find prospects, of having the landlord require that the buildings be removed from the property. All of these elements as they find them affecting the Almota Company and the property as of the date of taking."

The opinion of the Circuit Court involved in this hearing sets forth an assumed sale of the Almota property to "A" (App. to Pet. 35). In the Court's assumed transaction it is noteworthy that

"A" has rather thoroughly investigated all elements of value and consulted with a title attorney who warned him there was no legal right to a renewal of the lease. By other investigation he satisfied himself that there was, nevertheless, great probability of a renewal. Considering everything, including the risks involved, "A" as a willing buyer and not having to buy concluded that the lease plus the improvements owned by Almota were well worth $274,625 and so he made that offer. With Almota not having to sell and accepting the offer upon deciding that it was a fair price, why is the assumed transaction not a fair market sale?

The assumed facts meet all requirements of a fair market sale of the lease and the improvements thereon actually owned by Almota (Olson v. United States, supra, 292 U.S. 246). "A" has not offered Almota $274,625 for its lease and improvements plus a bill of sale to a renewal expectancy. "A's" offer is presumably only for an assignment of the lease and a bill of sale to the building improvements, machinery and equipment situated on the leasehold. "A" gets exactly what he bargained for and Almota has sold

no more than it has. Both are informed fully as to all elements of value. Both are presumably prudent and have acted freely and willingly. Yet, the Circuit Court proceeds on the assumption that somehow Almota is getting paid for something it did not own.

The Government has stipulated (App. 29-30) that the lease with Almota's improvements had a fair market value of $274,625 considering all elements affecting value. No property not actually owned is included. The probability of a renewal of the lease makes the continued use of the improvements in place a use to which they may reasonably be put at the end of the term of the lease. Thus that probability is an element of value to be considered.

It bothers the Circuit Court that the renewal possibilities are to some extent uncertain. But the cases do not eliminate even speculative values which inhere in the property taken where the market in fact values them. The Ninth Circuit itself has so held in Cal-Bay Corporation v. United States, 169 F.2d 15, involving an oil and gas lease. That case is approved in Phillips v. United

States, 243 F.2d 1, 9th Cir., which states:

> "3. The 'Element of Speculation' in Mineral Right Does Not Preclude Their Having an Ascertainable Market Value."
> * * * * *
> "We hold that in the instant case the market value of the property should have been fixed with consideration to all its available uses, including the mineral rights; that, despite the 'element of speculation' involved in mineral rights; such rights have an ascertainable market value; and that the lower Court's rejection of the proffers of evidence relating to mineral rights tainted the results in all the four consolidated cases."

Property may be either under or over valued upon the market. Fortunes have been made and lost by people who knew or merely thought that they knew the true value of property. Yet, fair market value is the measure of just compensation. So long as it remains so it is not for the Courts to second guess the market. Whether too high or too low it constitutes the pecuniary value of that which is taken. The owner must receive its equivalent to be placed in the same financial position as before the taking (Miller & Olson cases, supra, 292 U.S. 246 & 317 U.S. 369).

The Petty case, 327 U.S. 372, cited

in the opinion is of no importance in determining the value of the improvements taken from Almota. It deals only with the taking of a leasehold involving no tenant owned buildings. No compensable property rights remained at the end of the term to be valued.

The Emery Case, 59 N.E.763, cited in the Circuit Court opinion, is another case in which no building improvements or fixtures were involved in the taking. There the landlord owned the wharf. The tenant kept and removed his fixtures. No tenant owned property was taken involving any continued ownership by the lessee after the termination of the lease.

The argument in the Almota Case is not as to property interests which ended with the term of the lease. It is as to property the ownership of which is to continue after its expiration. The Circuit Court below failed to appreciate that distinction between the strictly leasehold interests which expire with the term and the "fee" ownership of the improvements which does not. No other logical conclusion can be drawn from the Court's statement in the opinion that the valuation

issue is no different because there are tenant owned buildings than if there were none. (App. to Pet. 42).

The Osborne case, 145 F.2d 892, and like cases referred to in the Circuit Court opinion (App. to Pet. 43) involve federal grazing permits. They are now superceded by Fuller and Jaramillo, supra.

With regard to the Scully case, 409 F.2d 1061 (C.A. 10), it should be observed that the case was one of the application of the unit rule in which the value of the whole had been fixed and the Government was no longer a party. The pie had already been baked and the case only involved its division. To cut a larger piece for the tenant meant a smaller piece for the landlord. The renewal expectancy fell short of a legally enforceable right against the landlord who could always preserve the value of his fee by refusing to renew the lease. The United States in the taking here is not in the position of the Scully landlord as the fee was owned by the railroad on the date of taking (App. 11).

Although the Circuit Court relies heavily upon Scully it ignores that case

and many others by not applying the unit rule, including its decisions in Burkhart v. U.S., 227 F.2d 659; U.S. v. Block, 160 F.2d 604; Nicholson v. Weaver, 194 F.2d 804; and U.S. v. Adamant, 197 F.2d 1.

Why should it be ignored here? Had the action been brought against the fee owner and Almota the Court could under no circumstances, have arrived at a valuation of only $130,000 (see the footnote at page 8). Certainly the stipulated value of $274,625 cannot here exceed the value of the fee and improvements.

The unimproved 3/4 acre of fee land, subject to the lease cannot possibly be worth in excess of $144,625. The $114.20 per year rent points to the fact that the fee was of relatively small value. Under the unit rule in an action against both the fee owner and Almota the award would be not less than the $274,625. Being the same identical property it cannot be less in an action against Almota alone. Here, by reason of the non-joinder of the fee owner and the failure to apply the unit rule well recognized by the Ninth Circuit and by the Scully case, supra, 409 F.2d 1061, the Court is restricting

the just compensation to less than one-half of that which would otherwise result.

Regardless of the reasoning of the Circuit Court in its decision below the obvious result is to reduce the award of just compensation by $144,625 less than those same legal interests would have sold for in a fair market sale. The Court's ruling fails to place Almota in the same pecuniary position it was in when the property was taken in violation of the rule of the Miller and Olson cases, supra, 292 U.S. 246 and 317 U.S. 369. The award of $130,000 for property which admittedly could have been sold for $274,625 will not place Almota in the same pecuniary position as if its property had not been taken.

$130,000 cannot under any circumstances be the fair market value of or just compensation for the very same identical property which admittedly could have been sold in a fair market sale for $274,625. The result is a real shell game in which Almota now comes up with $130,000 for the very same property it could have received $274,625 for immediately prior to the taking and it is told the award is the equivalent of those same property rights and is the pecuniary equivalent of what it previously owned. It is further told that

the lease expectancy is not a compensable property right and that the probability of the renewal of the lease is too speculative to be valued as an inherent element of the property taken. But Almota never claimed the ownership of a leasehold expectancy. Its only claim was that the probability of a renewal was an element adding great value upon the market to the property it did own. Obviously, the market does not consider it too speculative for valuation as the agreed difference between the two values is $144,625.

Moreover, the compensation awarded by the Circuit Court below is far less than the award which would have been made in a condemnation action brought against the owner as well as Almota. Under the well recognized unit rule, hereinbefore discussed, the property is valued as a whole. The value of the fee is the just compensation to be awarded to it and the amount by which the tenant owned improvements have enhanced its value is the amount to be awarded to the tenant. As remarked by the District Court in the hearing upon Almota's motion for determination of the law of the case (App. 4) had the fee owner been joined in the action the award to Almota would have been vastly greater than

that contended for by the Government.

That amount of just compensation does not depend to any extent upon the joinder or nonjoinder of the fee owner. Yet, carried to the extreme, the contention of the Government in an action against the tenant alone where the taking coincides with the end of the term of the lease would result in no compensation whatsoever for tenant owned improvements where due to the physical nature of the property it could neither be moved or salvaged, such as a water well. The improvements would there be acquired for nothing as under the Government's theory the tenant would be entitled to no compensation as he would have no legal right to continue to use the property upon the premises and it would have no salvage value. On the other hand, the fee owner could not collect as he is not their owner. In this case there has been no contention whatsoever that the award to Almota of the full amount contended for by it would in any way result in the Government having to pay more than the true value of the property yet the application of the Circuit Court rule results in great pecuniary loss to Almota.

Consequently, and regardless of all citations of authority and the reasoning of the Government and of the Circuit Court the award as made is not "just". If it is not just then it is contrary to the Constitution. Ultimately all that need be considered in this case is the Fifth Amendment itself which requires that "just" compensation must be paid for all property taken. If the amount awarded is in fact not "just" then the taking is necessarily unlawful and in violation of the constitutional rights of the owner. If Almota's interests in the property could have been liquidated upon the market for $274,625 nothing less can be just compensation.

CONCLUSION

That the judgment of the Ninth Circuit Court of Appeals filed and entered on Sept. 23, 1970, in accordance with its opinion of the same date, 450 F.2d 125 (App. A to pet. 32), should be reversed and the judgment of the District Court (App. 51) should be reinstated to award Almota just compensation of $274,625.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-951

ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (App. 35–50) are not reported. The opinion of the court of appeals (Pet. App. A, pp. 32–45) is reported at 450 F. 2d 125.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1971. A timely petition for rehearing, with a suggestion for rehearing *en banc,* was denied on December 9, 1971 (Pet. App. A, p. 46). The petition for a writ of certiorari was filed on January 24, 1972, and was granted on April 3, 1972

(App. 57). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon condemnation of a leasehold, a tenant with no right of renewal is entitled to compensation for the expectancy that the lease would have been renewed upon its termination.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part: "* * * nor shall private property be taken for public use, without just compensation."

STATEMENT

The United States brought this condemnation action to acquire petitioner's leasehold interest in an 0.75-acre parcel at Almota, Whitman County, Washington, in connection with the Little Goose Lock and Dam river improvement and navigation project on the Snake River. The district court entered judgment based on petitioner's theory that the compensation to which it was entitled was the market value of its leasehold taking into account the expectancy that the lease would be renewed upon its expiration. The court of appeals reversed and, in accordance with the government's contention, directed that judgment be entered based on an agreed value determined with reference to the remaining lease term without expectation of renewal.

1. The pertinent facts are undisputed. The land involved here was owned by the Oregon-Washington Railroad and Navigation Company, and was within the railroad's existing right-of-way. Petitioner leased the land from the railroad for a grain storage and shipment facility.

Petitioner's lease covered only the land for a 20-year term, and provided for an annual rental of $114.20. On the date of taking, seven and one-half years of the lease term remained. Petitioner had built and was using on the land a 522,500-bushel grain elevator and another, complementary building (App. 12–13). Petitioner had no right to renew the lease. Within six months after the lease term expired, petitioner was obligated to remove its improvements; otherwise the railroad would own them and could remove them at petitioner's expense. (App. 7, 12, 22–25.)

The parties stipulated that petitioner had occupied this land continuously under various leases from the railroad since about 1919 (App. 6, 16). The railroad leased lands owned by it to other grain elevator operators also. It had generally renewed and extended these various leases on the same or similar terms as the expired leaseholds, and "it was generally accepted by lessees of the railroad that such renewals * * * could be expected * * * so long as the lessee remains in business and is producing freight traffic for the railroad" (App. 25; see also *id.* at 16–17). As a result, prospective purchasers of leasehold interests (such as petitioner's) in railroad lands were willing to pay

more than the value of the bare legal rights owned by the tenant (App. 25–26).

The government sought to obtain all rights to the property in question. Prior to bringing the instant suit it settled with the railroad. The terms of that settlement were not brought out or urged as relevant in the present proceeding (Pet. App. A, p. 34).

2. The government then brought this action to acquire petitioner's "leasehold interest in said land [leased from the railroad] and the structures and improvements situated thereon, as said interest is set forth" in the lease agreement between petitioner and the railroad (App. 23–24). Although the lease provided that petitioner had the right to remove the structures and improvements at the end of the lease term, the parties stipulated that "the right to remove" those items was "excluded from th[is] proceeding" and revested in petitioner since the government did not need them (App. 28). Petitioner was given about six months to remove the improvements, during which time, and possibly for an additional month, it could occupy the land without payment of rent (App. 28, 33–34).

Petitioner claimed that the compensation to which it was entitled for its leasehold as thus modified "should be based upon what a willing buyer and a willing seller would have agreed upon as the fair market value for the unexpired term of the leasehold interest on the open market * * *, with consideration being given to the probability or possibility that the leasehold interest would be extended * * *" (App.

27). At a pretrial conference it contended that the market value of this kind of leasehold "is the full market value of a fee interest therein less only the market value of the unimproved leased land" (App. 18); thus, it claimed compensation measured by the useful life of its improvements without regard to the remaining lease term. The government contended, on the other hand, that the compensation due petitioner "should be based upon the fair market value of the legal rights" which petitioner had under the lease, and that "no consideration should be given to any additional value which might have been obtained upon the open market based upon a supposition or expectation that an extension of the [petitioner's] leasehold interest could have been obtained from the lessor at a favorable rental" (App. 26). The parties agreed that under petitioner's theory it would receive $274,625, while under the government's theory it would receive $130,000 (App. 29–30).

The district court sustained petitioner's contentions, agreeing that its compensation should include "the possibilities of renewal of the lease and of the landlord requiring the removal of the improvements" and "should not be limited by the bare legal rights" that petitioner had under the lease (App. 47, 48). The court of appeals reversed. It held that upon condemnation the government must pay only for legal interests, and that a tenant's expectancy that its lease will be renewed is not a compensable legal interest. Since the government's theory covered all of peti-

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tioner's legal rights at issue, the court ordered that judgment be entered on that basis.

SUMMARY OF ARGUMENT

The only question presented in this case concerns the "just compensation" to which the Fifth Amendment entitles petitioner because of the government's taking of its leasehold interest. While "just compensation" means that the owner of property condemned is to be put in as good position pecuniarily as he would have occupied if his property had not been taken, the compensation must also be just to the public. Petitioner's claim for additional compensation is based solely on the expectancy that its lease would have been renewed, a factor with respect to which petitioner has no legal right and is not entitled to any compensation.

A. The Fifth Amendment protects only property rights. Accordingly, the compensation which must be paid is limited to the value of the condemnee's legal rights in the property taken. This rule has been repeatedly invoked to deny recovery to a condemnee for values which, although generally related to the property taken, are neither part of nor a measure of the condemnee's legal rights.

The expectancies of tenants whose leases provide no right of renewal stand on no different constitutional footing than the expectancies of occupants who have no property interest. Accordingly, this Court squarely held in *United States* v. *Petty Motor Co.*, 327 U.S. 372, that a tenant's expectation that its leasehold would be renewed even though its lease did not

so provide is not a compensable element of value under the Fifth Amendment. As the Court explained, "[t]he fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights" (327 U.S. at 380, n. 9). Instead, a tenant is entitled to compensation measured solely on the basis of the "remainder of its term which existed after its ouster" (*id.* at 380).

B. The claim for additional compensation in this case is grounded wholly on petitioner's expectancy that its lease would have been renewed. But, as in *Petty Motor Co.*, this added nothing to petitioner's legal rights, which is all that the compensation required by the Fifth Amendment must cover. The court below, therefore, correctly applied the rule of *Petty Motor Co.*, in sustaining the government's theory which fully compensated petitioner for all its legal rights.

Adoption of petitioner's contention that the expectancy of renewal is an element of the leasehold's value which is taken into account in the open market, and thus should be considered in determining just compensation, would have anomalous results. Unquestionably, the railroad, or other private owner to which the railroad transferred its interest, could have declined to renew the lease and required petitioner to remove its improvements at the end of the lease term. Indeed, if the United States had taken the fee and simply waited for petitioner's lease to expire and for petitioner to remove its improvements, petitioner obviously would be entitled to no compensation. Petitioner

would have exhausted all the rights conferred by the lease—use and occupancy of the land and improvements during the lease term plus the right to remove the improvements when the lease ended. Those rights are the measure of compensation adopted by the court below.

The claim that the government should be required to pay an additional amount on condemnation, based on the tenant's renewal expectancy, would thus result in a *higher* measure of compensation because lands are being taken by the United States for public purposes, rather than being used for a different private purpose by a private owner. The Fifth Amendment does not mandate that it shall be more costly to put lands to public uses than to private uses.

The expectancy of renewal is therefore very different from conditions which may directly affect the use and occupancy of land (during the term of the lease), such as prospective competition, road conditions, and the like. Considerations of that kind may be taken into account in determining just compensation, and indeed that was done in this case. But the prospect of renewal is independent of a tenant's leasehold rights; instead, it is like the "numerous business [and other consequential] losses which result from condemnation of properties but which are not compensable under the Fifth Amendment" (*United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266, 281).

Petitioner's rights in the improvements have been accounted for in this case. The government's theory fully compensated petitioner for the right to occupy

and use the improvements during the lease term. The only other right that the lease gave petitioner was ownership of the improvements and the right to remove them at the end of the lease. This was taken care of by the parties' agreement that this proceeding did not cover the right to remove and revesting that right in petitioner. The cases relied on by petitioner dealing with tenant leasehold improvements when there is no such agreement consequently are not apposite. At all events, those cases involved significantly different circumstances. To the extent they may have been grounded on compensating a tenant based on a mere possibility of renewal, they were incorrectly decided.

ARGUMENT

UPON CONDEMNATION OF A LEASEHOLD, A TENANT WHOSE LEASE DOES NOT PROVIDE FOR A RIGHT OF RENEWAL IS NOT ENTITLED TO ANY COMPENSATION BASED ON THE POSSIBILITY THAT THE LEASE WOULD HAVE BEEN RENEWED

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."[1] This case involves the taking of a leasehold interest which petitioner, as tenant, owned by reason of a written lease agreement. It is agreed that the government "took", in the Fifth Amend-

[1] In addition to the Fifth Amendment, petitioner cites Section 111 of the Rivers and Harbors Act of 1970 (84 Stat. 1821, 33 U.S.C. 595a). As discussed *infra*, n. 8, p. 23, Section 595(a) has no application to this case.

ment sense, all that petitioner owned with respect to its leasehold. There is also agreement that the tenancy for years which petitioner's leasehold gave it was "private property" for which petitioner must be paid. See *Duckett & Co.* v. *United States,* 266 U.S. 149, 151; *United States* v. *General Motors Corp.,* 323 U.S. 373, 378. The only question presented concerns the "just compensation" to which petitioner is entitled as a consequence thereof.

Just compensation "means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *United States* v. *Miller,* 317 U.S. 369, 373 (footnotes omitted). The compensation must, however, be "just, not merely to the individual whose property is taken, but to the public which is to pay for it." *Searl* v. *School District, Lake County,* 133 U.S. 553, 562; accord, *Bauman* v. *Ross.* 167 U.S. 548, 574.

In the present case, petitioner has received full compensation for the legal rights that it owned under its leasehold—the right to occupy and to use the leased land and the improvements constructed thereon for the remainder of the lease term, and the right to remove the improvements at the end of that term. Petitioner's claim for additional compensation is based solely on the expectancy that its lease would have been renewed, a factor with respect to which, it is conceded (see Pet. Br. 2, 9, 16–17), petitioner had no legal right. The rejection of that claim by the court below was correct under settled principles of federal law.

A. THE FIFTH AMENDMENT REQUIRES THE UNITED STATES TO PAY ONLY FOR PROPERTY TAKEN, AND NOT FOR OTHER VALUE THAT MAY BE LOST.

1. It is firmly established in federal eminent domain law that the "existence of value alone does not generate interests protected by the Constitution against diminution by the government * * *." *Reichelderfer* v. *Quinn*, 287 U.S. 315, 319. The Fifth Amendment protects only property rights; there is no requirement that the government compensate "for opportunities which the owner [of the property taken] may lose" (*United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282), such as frustrated business opportunities (*Omnia Co.* v. *United States*, 261 U.S. 502) or even the consequential destruction of a business (*Mitchell* v. *United States*, 267 U.S. 341). "[D]amage alone gives courts no power to require compensation where there is not an actual taking of property." *United States* v. *Willow River Co.*, 324 U.S. 499, 510 (citations omitted).[3]

[3] See, also, *Joslin Co.* v. *Providence*, 262 U.S. 668, 675; *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, 94–95; *Bothwell* v. *United States*, 254 U.S. 231, 233; *United States* v. *677.50 Acres in Marion County, Kan.* (*Clear Creek*), 420 F. 2d 1136 (C.A. 10), certiorari denied, 398 U.S. 928; *Stipe* v. *United States*, 337 F. 2d 818, 821–822 (C.A. 10); *Hooten* v. *United States*, 405 F. 2d 1167 (C.A. 5); *J. A. Tobin Construction Co.* v. *United States*, 343 F. 2d 422 (C.A. 10), certiorari denied, 382 U.S. 830; *R. J. Widen Company* v. *United States*, 357 F. 2d 988 (C. Cl.).

In this respect, the Fifth Amendment differs from the constitutions and laws of some states, which "require that compensation be made for consequential damages to private property resulting from public improvements." *Mitchell* v. *United States*, 267 U.S. 341, 345–346. See also, *Chicago* v. *Taylor*, 125 U.S. 161.

Consequently, the compensation that must be paid is limited to the value of the condemnee's legal rights in the property taken. This rule has been repeatedly invoked to deny recovery to a condemnee for values which, although generally related to the property taken, are neither a part of nor a measure of his legal rights in that property. For example, elements of value based on the fact that the property has a special value to its owner or to the taker, and values attributable to the proposed government project itself, are excluded from the compensation the government is required to pay. *United States* v. *Cors*, 337 U.S. 325, 332–334; see *Shoemaker* v. *United States*, 147 U.S. 282, 303–305; *United States* v. *Miller*, *supra*, 317 U.S. at 376–379; *United States* v. *Reynolds*, 397 U.S. 14, 16. Similarly, in *United States* v. *Rands*, 389 U.S. 121, the Court held that the compensation which the United States is constitutionally required to pay when it condemns riparian land does not include the land's value as a port site, since the special values that inhere in the flow of navigable waters are part of the public domain.[8] And, in the absence of treaty obliga-

[8] See, also, *Gilman* v. *Philadelphia*, 3 Wall. 713, 725; *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 69; *United States* v. *Willow River Co.*, 324 U.S. 499, 509; *United States* v. *Twin City Power Co.*, 350 U.S. 222, 227–228; *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 233; *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 629.

In *United States* v. *Fuller*, No. 71–559, which is set for

tions, the permission granted Indian tribes to continue in possession of aboriginal lands "is not a property right but amounts to a right of occupancy which * * * may be terminated * * * by the sovereign itself without any legally enforceable obligation to compensate the Indians." *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279. Like those using or occupying the public domain, persons using or occupying private property by virtue of a license or contracted right, without any legal interest in the land itself, are not entitled to compensation when the property is taken by condemnation. *Chicago, M., St. P. & P.R. Co.* v. *Chicago, R.I. & P. Ry. Co.*, 138 F. 2d 268 (C.A. 8), certiorari denied, 320 U.S. 804; *Sinclair Pipe Line Co.* v. *United States*, 287 F. 2d 175 (Ct. Cl.).

2. The expectancies of tenants whose leases provide no right of renewal stand on no different constitutional footing than the expectancies of occupants who have no property interest. Accordingly, in *United States* v. *Petty Motor Co.*, 327 U.S. 372, a decision that

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argument with the present case, we contend that this rationale is fully applicable when the United States condemns ranch lands adjoining public lands on which the owner holds revocable grazing permits under the Taylor Grazing Act. Although such permits undoubtedly are of value to the permittees, it has consistently been held that the United States may revoke them without being liable under the Fifth Amendment, since the permits confer no compensable property interest in the public lands. See our brief in *Fuller*, p. 10.

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would appear to be conclusive here, this Court held that a tenant's expectancy that its leasehold would be renewed upon expiration even though its lease did not provide for renewal is not a compensable element of value under the Fifth Amendment. In that case, month-to-month tenants whose leaseholds were condemned asserted a claim for compensation based on the increased market value that the leaseholds allegedly had because they might be renewed. The district court concluded that since the tenancies in fact might have continued, the jury should consider that factor in determining the values of the tenancies. The court of appeals affirmed the ensuing jury awards based on the instructions to take into account the renewal possibility, noting that "each [month-to-month] tenant * * * had every reason to think he could remain indefinitely as a tenant, and the record justifies the conclusion that each would have continued for an indefinite period had not the government begun condemnation proceedings" (147 F. 2d 912, 913).

This Court reversed, holding, *inter alia,* that each tenant was entitled to compensation measured solely on the basis of the "remainder of its term which existed after its ouster" (327 U.S. at 380). For the month-to-month tenants, the remaining term depended upon the applicable state law "on the requirement for notice to terminate" that type of tenancy (*ibid.*).[4] The Court emphatically rejected the contention that the compensation payable to any tenant should include an

[4] One tenant involved in the *Petty Motor* case had a written lease agreement specifying a primary lease term and granting

allowance for the possibility that a lease might be renewed (327 U.S. at 380, n. 9):

"The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights. *Emery* v. *Boston Terminal Co.*, 178 Mass. 172, 185, 59 N.E. 763 [per Holmes, C.J.]:

> 'It appeared that the owners had been in the habit of renewing the petitioners' lease from time to time, and an attempt was made to give this fact the aspect of an English customary tenant right. The evidence merely showed that the landlords and the tenants were mutually satisfied and were likely to keep on together. It added nothing except by way of corroboration to the testimony that they both intended to keep on. Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right. The court was right in excluding expert evidence as to an increase from that source.' "

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the tenant the right to a renewal term. The Court stated that for that tenant, "The measure of damages is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew in the lease of Petty, less the agreed rent which the tenant would pay for such use and occupancy" (327 U.S. at 381). In the instant case, of course, petitioner's lease granted it no right of renewal.

B. UNDER THE DECISION BELOW PETITIONER IS PAID FOR ALL ITS LEGAL RIGHTS IN THE LEASEHOLD TAKEN AND THUS IS FULLY COMPENSATED AS REQUIRED BY THE FIFTH AMENDMENT

1. As set forth above (*supra*, pp. 4–5), the present proceeding initially involved petitioner's entire leasehold interest in the land covered by its lease and the improvements that it had built thereon. The parties subsequently agreed, however, to exclude one element of petitioner's leasehold interest—the right to remove the improvements when the lease term expired was revested in petitioner, and it was allowed time to do so. The parties also agreed concerning the compensation for petitioner's leasehold interest without the removal right, except as regards the factor in issue here; as regards that factor, petitioner claimed that in determining compensation "the probability or possibility that the leasehold interest would be extended" should be considered, while the government contended that "no consideration should be given to any additional value" attributable thereto (App. 27, 26).

The theory petitioner asserts here, like that of the tenants in *Petty Motor Co.*, is based wholly on the renewal expectancy existing by reason of the railroad's past practice of renewing and extending its tenants' leaseholds. But "[t]he fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights" (*Petty Motor Co., supra*, 327 U.S. at 380, n. 9). And the compensation required by the Fifth Amendment is limited to the tenant's legal rights, and hence is to be determined solely on the basis of the remaining lease term.

In this case, therefore, the court of appeals correctly applied the rule of *Petty Motor Co.* in sustaining the government's theory, which, as is conceded, fully compensated petitioner for all its legal rights.

The Court of Appeals for the Tenth Circuit recently reached the same conclusion in *Scully* v. *United States*, 409 F. 2d 1061, certiorari denied *sub nom. Meisinger* v. *Scully*, 396 U.S. 876. The tenant in *Scully* leased farm land on an annual basis, and owned all the improvements (house, barn, fences, etc.) located thereon. Other tenants had similar leases with the same landlord, and the leases were customarily renewed year after year, even though the tenants had no legal right of renewal. As a consequence, the so-called "Scully leases" had a market value greater than the value of the one-year term and the improvements. The district court took this into account in determining the compensation due the tenant when the government condemned the land.

The landowner appealed[*] and the court of appeals

[*] The principal issue in *Scully* concerned distribution of the condemnation award between the landowner and the tenant. The landowner asserted in the court of appeals that the tenant's award was based on an interest greater than merely the one-year term of the lease; the government appeared in that court solely to request that the total award be approved and to indicate that it had no interest in the question of distribution between landowner and tenant (409 F. 2d at 1063). In its memorandum in opposition to the tenant's petition for a writ of certiorari, however, the government noted that the tenant's contentions might result in the United States having to pay more than the value of the respective parties' legal interests in the condemned land, and stated that the court of appeals had "correctly applied the rule of" *Petty Motor Co.* and properly limited the tenant's award to the value of its remaining lease

reversed the award to the tenant. It held that the custom of renewing Scully leases over an extended number of years could not create a legal interest in the tenant beyond the one-year term since the lease did not provide for a right of renewal. The court also rejected, on the authority of *Petty Motor Co.*, the alternative contention that, even viewing the lease as a one-year lease, the tenant's compensation should be measured in terms of market value including the renewal expectancy, since the expectancy was reflected in dealings on the open market. For, as in *Petty Motor Co.* and in the *Emery* v. *Boston Terminal Co.* case on which it relied, the expectancy added nothing to the tenant's legal rights, which is all that must be paid for. Cf. *United States* v. *Honolulu Plantation Co.*, 182 F. 2d 172, 175 (C.A. 9), certiorari denied, 340 U.S. 820.

2. Petitioner argues, however, that its market value theory does not involve compensation for a renewal expectancy as such. Rather, it contends, the only issues are what elements go into determining "just compensation" for its leasehold rights, and whether the computation thereof should include "consideration of some reasonably probable uses to which the property might be put at the end of the lease term"—more specifically, "the reasonable probability of continuing the use of the buildings in place upon the leased premises" (Pet. Br. 17). Since this factor is taken into account in the open market, and presum-

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term without allowance for the renewal expectancy (Memo. in Opp., p. 3, No. 396, O.T., 1969).

ably would there enable petitioner to obtain from a prospective purchaser the amount it is claiming under its theory, it follows, petitioner urges, that "[t]he probability of a renewal of the lease * * * is an element of value to be considered" (*id.* at 30).[6]

Petitioner's proposed circumvention of the rule of *Petty Motor Co.* would have anomalous results. Unquestionably, petitioner's landlord, the railroad, could have declined to renew the lease and required petitioner to remove its improvements at the end of the lease term so that the land could be used for a different purpose. Or the railroad could have sold its underlying fee interest in the land to another private owner, who might have done the same thing. In either event, petitioner under its lease would have received only the use and occupancy of the land and buildings during the remaining term, plus the right to remove the improvements at the end of the term. That, of course, is precisely the measure of compensation which *Petty Motor Co.* requires (see 327 U.S. at 380–381), and is the measure of compensation adopted by the court of appeals here. See, also, *Southern California Fisher-*

[6] Petitioner's contentions parallel those made by the tenant in *Scully* and summarized by the court of appeals there as follows (409 F. 2d at 1065): "The lessee contends * * * that even if his leasehold estate is viewed as a simple one year term, he is nevertheless entitled to recover the amount that would have been received had the lease been sold in the open market. Essentially, the argument is that the likelihood of renewal added to the value of the lease; the government's obligation in fixing a just compensation is measured in terms of market value; the renewal expectancy is reflected in the fair market value and therefore must be recoverable."

man's Ass'n v. *United States*, 174 F. 2d 739, 740 (C.A. 9).

Yet, petitioner claims that the government should be required to pay an additional amount when it condemns a tenant's leasehold, not because of the tenant's lease rights, but because of the prospect that the lease might be renewed.[1] There is no rational basis for requiring a *higher* measure of compensation because the lands are being taken by the United States for public purposes, rather than being used for a different private purpose by a private owner. Cf. *United States ex rel. T.V.A.* v. *Powelson*, *supra*, 319 U.S. at 278–279. The Fifth Amendment does not mandate that it shall be more costly to put lands to public use than to put them to

[1] In negotiating its lease with the railroad, petitioner surely took into account the likely value at the end of the lease term of the improvements that it contemplated building, or had already built, on the leased land. The lease agreement provides only for a right of removal; presumably, petitioner concluded that this provision adequately safeguarded its interests upon expiration of the lease, and that keeping the improvements in place, which could have been assured by such means as a renewal right, was not essential to it. Indeed, the lease does not merely give petitioner a right to remove the improvements, but requires it to remove them or forfeit ownership of them to the railroad, which could then remove them at petitioner's expense (App. 7, 12, 25). Thus, compensating petitioner for its rights when the lease expired only on the basis of its right to remove works no hardship on it, since that is precisely what the parties contemplated. Compare *Petty Motor Co.*, *supra*, 327 U.S. at 375–376, where the Court held that a tenant whose lease provided for "automatic termination" upon condemnation was not entitled to any compensation for its leasehold interest, on the ground that the tenant "had contracted away any rights that it might otherwise have had" (*id.* at 376).

private uses. Such a result would not comport with the principle that the compensation paid must be just, not merely to the condemnee, "but to the public which is to pay for it" (*Searl* v. *School District, Lake County, supra,* 133 U.S. at 562).

Moreover, the United States could have taken only the railroad's fee interest in the property and let petitioner continue under its leasehold until the term expired. If the government then did not renew the lease but instead required petitioner to remove its improvements, petitioner would not be entitled to any compensation. Its rights still would be controlled by the lease, and it would have received all that the lease gave it—use and occupancy during the lease term and the right of removal upon expiration. Compare *Messer* v. *United States,* 157 F. 2d 793, 794–795 (C.A. 5).

The prospect of renewal for which petitioner claims it should be compensated is thus wholly independent of its leasehold interest. Petitioner could realize fully the rights and privileges which the lease affords it without regard to renewal; indeed, renewal would become relevant only upon expiration of the term provided in the lease, at which point petitioner would already have realized all its rights under the lease except the right of removal.

The prospect of renewal, therefore, is very different from such matters as prospective competition, favorable road conditions, and similar considerations to which petitioner refers (see Pet. Br. 21, 24–25, 30–31). Because such factors may directly affect the use and occupancy of land (here during the remaining

lease term), the courts have held, as petitioner correctly notes, that such matters are relevant elements in determining the value of land and may be taken into consideration in fixing just compensation when an interest in the land is taken.

There can be no doubt that in the instant case allowance is in fact made under the government's theory for the relevant elements of value which properly may be considered. Since the parties excluded the right of removal from the case (*supra,* p. 4), the compensation payable under the government's theory is for petitioner's right to use and occupy the land and improvements during the remaining lease term. The computation is in accordance with the formula stated in *Petty Motor Co.* (327 U.S. at 381): "The measure of damages is the value of the use and occupancy * * *, less the agreed rent which the tenant would pay for such use and occupancy." Petitioner paid only $114.20 per year in rent, and for the remaining term of the lease (seven and one-half years) the total rent payable would have been about $900. The net compensation under the government's theory is $130,000; the value of petitioner's use and occupancy is the sum of that amount and the total rent payable, or $130,900. The fact that this figure is significantly greater than the rent petitioner is obligated to pay, and was agreed upon by the parties, presumably indicates that various elements of value concerning petitioner's use and occupancy—including those to which petitioner refers—were fully taken into account.

Petitioner's claim for additional compensation thus rests solely on the renewal prospect, and the fact that the government's taking frustrated this prospect and precluded petitioner from continuing its highly valuable occupancy beyond the term specified in the lease. But, as set forth above, renewal was not part of petitioner's leasehold rights. Instead, it was like the "numerous business [and other consequential] losses which result from condemnation of properties but which are not compensable under the Fifth Amendment." *United States ex rel. T.V.A.* v. *Powelson, supra,* 319 U.S. at 281; see, also, *Omnia Co.* v. *United States, supra; Mitchell* v. *United States, supra.*[8] Petitioner's argument that the possibility of renewal may nevertheless be considered as an element of value is, as the court below pointed out (Pet. App. A, p. 42),

[8] While Congress may, of course, provide for payment in excess of the just compensation that is constitutionally required (*e.g., Mitchell* v. *United States, supra,* 267 U.S. at 346; *United States* v. *Willow River Co., supra,* 324 U.S. at 510), it has not done so for this case. Section 111 of the Rivers and Harbors Act of 1970 (84 Stat. 1821, 33 U.S.C. 595a), on which petitioner places some reliance (see Pet. Br. 15, 18–19), does so in the limited situation it covers. But that statute has no application in the circumstance here. Stated simply, Section 595(a) provides that where (1) land is taken in its entirety, (2) for public use in connection with the improvement of rivers, harbors, canals, or waterways, (3) the land is to be valued at its best use, even if dependent upon access to the navigable waters in question. The parties have agreed that the highest and best use of petitioner's leasehold interest "was that of a grain and pea storage and handling facility" (App. 13). Thus, there is no dispute in this case concerning highest and best use, nor is there any suggestion that access to navigable waters is in any way involved.

nothing more than an attempt to bypass the rule of *Petty Motor Co.*, and is in fundamental conflict with the decision in that case.[9]

3. Petitioner's real concern in this case appears to be with the compensation payable for its rights with respect to the improvements that it built on the land it leased. Pointing out that its rights in the improvements "did not end" upon expiration of the lease term, petitioner contends that "the lease renewal expectancy was an inherent element affecting [the improvements'] fair market value" (apparently even after the lease term expired), which was "entitled to consideration" (Pet. Br. 23; see, also, *id.* at 17–18).

Petitioner's rights in the improvements have been fully accounted for in this case. The lease gave petitioner essentially two distinct rights with respect to the improvements—the right to occupy and use them on the land during the lease term, and ownership of and the right to remove them when the term expired.[10]

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[9] Petitioner suggests that the rationale of *Petty Motor Co.* is inapplicable to the present case because *Petty* "deals only with the taking of a leasehold involving no tenant owned buildings" (Pet. Br. 32). But, in holding that the possibility of renewal is not a compensable element, this Court in *Petty* made clear that this was because such a prospect does not add to the tenant's rights. This is equally true in the present case as in a case like *Petty* involving only improvements that are more easily removable by a tenant; like petitioner, the tenant in that circumstance has only the right to remove the improvements, and he is to be compensated only for that right and the remaining lease term.

[10] Perhaps in part because of the very favorable rental fee (see *supra*, p. 22), petitioner was willing to assume the risk of building its improvements under the very limited legal protections provided by its lease. That risk included the possibility that the railroad or one who purchased the fee from

Petitioner does not suggest that the government's theory fails to provide full compensation for the first. And the second was taken care of by the parties' agreement regarding removal.

As previously noted, the parties stipulated that "the right to remove" the improvements "is excluded from the proceeding, and * * * revested in the former owner," *i.e.*, petitioner, and petitioner was allowed time to effect removal (App. 28). Apart from use and occupancy, this was the only other right that petitioner had under the lease. While it owned the improvements when the lease expired, its ownership did not entitle it to have or to use them on the land but was subject to petitioner's removing them, failing in which they became the railroad's property (App. 7, 12, 24–25). In agreeing to the stipulation, petitioner accepted this arrangement in full settlement of its ownership and removal rights at the end of the lease; presumably petitioner took into account whatever value the improvements had to it in place and concluded that removal under the stipulation was better from its viewpoint.

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it (whether by condemnation or otherwise) might choose not to extend the term of petitioner's lease. Petitioner's attempt to transfer the burden of that risk to the United States is without legal warrant. Compare *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 599 (the owner of improvements built up from low-water mark in the bed of a navigable stream is not entitled to compensation from the United States when it raises the water level of the stream, and thereby destroys the improvements, for the purpose of improving navigation, since "any structure is placed in the bed of a stream at the risk that it may be so injured or destroyed [without compensation by a federal improvement of navigable capacity]").

Thus, the stipulation, we submit, provided for all of petitioner's rights upon expiration of the lease, so that valuation of petitioner's interest in the improvements at that point is not an issue in this case.[11] It follows that the cases on which petitioner relies dealing with tenant leasehold improvements when there is no such agreement—*United States* v. *Seagren*, 50 F. 2d 333 (C.A. D.C.); *United States* v. *Certain Property, Borough of Manhattan*, 388 F. 2d 596 (C.A. 2); and *United States* v. *1,132.50 Acres of Land, Etc., Allegheny*, 441 F. 2d 356 (C.A. 2)—are not apposite. At all events, those cases involved significantly different circumstances, and, to the extent that those decisions are grounded on compensating a tenant based on the chance or expectancy of renewal, we believe they were incorrectly decided.

[11] Petitioner objects, however, that the court below did not apply the "unit rule" here, by valuing the land and improvements as though the lease did not exist (Pet. Br. 8, 33-34). But the railroad was not in this case because the government had settled previously with it. In this circumstance, the Court pointed out in *Petty Motor Co.* (327 U.S. 374), "the value of the use of the totality of property, which was taken, thus lost all meaning," and the government had "a separate responsibility to compensate [petitioner] for any legally recognized interest which [it] may have in the property. See *Duckett & Co.* v. *United States*, 266 U.S. 149." See, also, *Messer* v. *United States*, *supra*, 157 F. 2d at 795, n. 5. Moreover, where the ownership of property is divided, "the Constitution does not require a disregard of the mode of ownership— of the state of the title," or that "a parcel of land * * * be valued as an unencumbered whole when it is not held as an unencumbered whole." *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195. The division of ownership between landlord and tenant, as in this case, might well call for independent valuation

In *Seagren*, the United States declined to pay a tenant any amount for leasehold improvements (a gasoline station) which the tenant had built and was entitled to remove on termination, claiming that because of the removal right the improvements were not part of the realty which it had condemned but instead were "personalty, which it may order removed without payment" (50 F. 2d at 335). Thus, the government sought to escape all liability for the improvements, even though as a practical matter it had taken those items by its condemnation of the land because they could not be removed. The court held that the government could not avoid liability for the improvements by requiring the tenant to remove them. The same situation was presented in the *Borough of Manhattan* case. The government's declaration of taking excluded removable trade fixtures owned by tenants, based on which it asserted that it did not have to compensate the tenants for such items despite the fact that the fixtures could not be removed without loss of all or most of their value so that they were deemed part of the realty under state law. The court held that the government "cannot deny compensation for fixtures by simply writing an exception into the declaration of taking excluding from compensation property which is in fact taken" (388 F. 2d at 598; see, also, the earlier appeals in this case at 344 F. 2d 142, 144–146, and 306 F. 2d 439, 444–445). In the present case, by

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of each interest even if both parties were joined in the condemnation proceeding. See Johnston, "*Just Compensation*" *For Lessor and Lessee*, 22 Vanderbilt L. R. 293, 310–319 (1969).

contrast, the government took all of petitioner's interest in the improvements and agreed to compensate petitioner for that interest, and the only question concerns the proper measure of compensation. See *Messer* v. *United States, supra,* 157 F. 2d at 795.

To be sure, the Second Circuit in *Borough of Manhattan* also considered the measure of compensation for the tenant's fixtures.[12] On rehearing *en banc,* the court awarded compensation based on current cost less an allowance for deterioration "computed in the first instance on the basis of useful life and without regard to the term of the particular lease" (388 F. 2d at 601). It explained that merely because the tenants had short-term leases did not mean that they would not be able "to derive any value from their fixtures beyond the expiration of their leases" (*ibid.*). In effect, the court simply disagreed with the government's computation of an appropriate salvage value for the fixtures when the leases expired. Compare *United States* v. *1,132.50 Acres of Land, Etc., Allegheny, supra,* where the same court of appeals later sustained an award for the tenant's fixtures based on removal value, and rejected the depreciated reproduction cost data proffered by the tenant.

Moreover, in New York City, where the *Borough of Manhattan* case arose, the legislature has enacted rent control statutes that afford tenants extensive

[12] This was not an issue in *Seagren*, where the court pointed out that "No question is made here on the arithmetic, the United States apparently conceding the values * * *" (50 F. 2d at 334).

rights irrespective of the provisions of their leases. See Title 23, McKinney's Consolidated Laws of New York Ann. These statutes circumscribe carefully a landlord's rights to evict a tenant, even upon expiration of the term specified in the lease, thus in effect granting the tenant a renewal right by law. See *id.*, Sections 8528, 8558, 8585. This special legislation, which apparently covered all parties in the *Borough of Manhattan* case, might justify the result in that case even under the rationale of *Petty Motor Co.* To the extent that the Second Circuit's position may be based on compensating the tenant for the possibility that its lease might be renewed even though no right of renewal exists, we believe for the reasons set forth above that it is wrong under the decision of this Court in *Petty Motor Co.*

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. 71-951

ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY, a Washington Corporation,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY TO QUESTION PRESENTED

Respondent's question is erroneous as it makes the issue one of whether a lease renewal expectancy can be recovered as an item of compensable property whereas the true problem is should that expectancy be considered as an inherent element of value in determining just compensation for a tenant's leasehold improvements taken where great value is thereby added by the probability of their continued use in place.

REPLY TO STATEMENT

In the record as made in the trial court there were no disputed facts. But that is not true here regardless of Petitioner's previous assumption to the contrary. The answering brief at page 4 states as a fact that the Government

> "Prior to bringing the instant suit it settled with the railroad. * * * (Pet. App. A, p. 34)."

That statement is positively not supported by any evidence or admitted fact. The quoted citation refers only to an unsupported statement in the Circuit Court opinion now under review. Presumably, that conclusion was seized upon from a footnote to that effect in a Government brief to the court which gave no supporting citation. In fact it was not true. The erroneous statement was overlooked by petitioner and not called to the Court's attention. It is not an agreed or admitted fact (App. 22) nor was it one of the facts found by the District Court (App. 35).

That same assertion was made in the answering brief to Almota's petition for writ of certiorari in this proceeding. It was replied to at page 1 of the reply brief. Nevertheless, it is reasserted

without citing any supporting record fact. In now failing to cite the record the Government is presumably conceding that there is none.

The statement at page 5 of the answering brief that the District Court agreed Almota's compensation should include "the possibilities of renewal of the lease" is misleading in that it is subject to the interpretation that the court allowed recovery for a renewal expectancy as a compensable property right whereas it held only that in the determination of the fair market value of the tenant owned improvements the possibility of renewal should be considered as an element of inherent value along with all other elements affecting their fair market value (App. 17,27,43, & 47 & Pet. App. A 50).

The Circuit Court in its reversal and holding that the renewal expectancy was not a compensable legal interest overlooked the fact that the District Court awarded no compensation for any such interest.

There has never been any contention either that the agreed market value of $274,625 exceeds in any amount the enhancement in the market value of the fee as a whole arising from the tenant owned improve-

ments or that the agreed value of $130,000 is equal to the sum by which those improvements increased the value of the property as a whole.

REPLY TO ARGUMENT

The Government's argument is primarily based upon the premise that payment is only required to be made for "property rights". It assumes the District Court allowed and Almota is claiming compensation for the possibilities of the renewal of the lease as a compensable property right. It concludes that since they do not rise to that status they cannot be considered in determining just compensation.

Petitioner's opening brief already fully answers that argument particularly commencing at page 19. It should suffice to reiterate that the trial court only held and Almota only contends that the probability of the renewal of the lease is an inherent element of value greatly increasing the market value of the building improvements owned by petitioner in that it made probable a continued use of the property in place thereby making that one of the reasonably expected uses to which the property could be put and

which must be considered in its valuation. Thus Almota will not have received just compensation for those property rights until it is paid their full fair market value considering all elements affecting that value which sum is agreed to be $274,625 (App. 29-30).

Basically the fallacy of the government results from restricting the market value of the building improvements at the end of the term of the lease to salvage or removal value without considering any other probable use of the property. What is to be recovered in the way of economic salvage from tearing down a 148,460 bu. concrete grain tank or to be gained from attempting to move such a huge structure? Presumably, had the improvements been taken concurrent with the expiration of the lease their salvage or removal value would be virtually nothing even though they could then be sold for a large sum and added great value to the property as a whole. The Government would thereby obtain valuable improvements without substantial compensation.

The Petty Motor Company case (327 U.S. 372), chiefly relied upon by the Government, in no way purports to lay down any

rule for the valuation of tenant owned improvements. It does rule that payment need only be made for property rights taken but it does not hold that inherent elements of value affecting their market price must rise to the status of compensable property rights before they can be considered in the determination of the fair market value of property taken. Other cases cited in Petitioner's brief (p. 18-21) repeatedly state that in the determination of market value all uses to which the property may reasonably be put must be considered. It was agreed by stipulation that there was a great likelihood of a lease renewal (App. 25). Hence it has in effect been agreed that the continued use of the improvements in place is a reasonably probable use to which they may be put upon the termination of the lease.

As pointed out in the opening brief (p. 18-25) elements affecting market value may be considered even though they do not in themselves constitute a legal property right. An additional case so holding and not previously cited is Sittenfeld v. Tobriner (459 F.2d 1137, Wash.D.C. Cir.). The court there held with reference to litigation of fair market value in a condem-

nation action that evidence of a reasonable probability of rezoning was admissible. The opinion states at page 1139:

> "Thus, it would have been appropriate for appellants, had they proceeded with the condemnation hearing rather than settling, to have introduced evidence tending to establish just compensation. We have no doubt that such proof could have properly included evidence of a reasonable probability of rezoning."

The Scully case (409 F.2d 1061) is also heavily relied upon. As explained at page 33 of Petitioner's brief that case is not decisive of the issue here as it involved only the apportionment between a landlord and a tenant of an entire award already made. The opinion states "* * * * the value of the leasehold must be reexamined within the framework of the existing total award which cannot now be disturbed". The Scully landlord had a legal right to refuse to renew the lease but the Government here did not as the railroad was still the owner (App. 11).

The Scully case was an application of the unit rule which the Government is here declining to follow. The value of the improvements was arrived at by an apportionment. Since an erroneous value had been

attributed to the lease, exclusive of improvements, it was considered possible that some part of the erroneous value had been apportioned to the improvements. That conclusion appears to have been influenced by the tenant's argument. The court observed, "This does not mean, as urged by the lessee, that the full amount of the comparable sales prices should now be taken to have been paid for the improvements only." The court went on to state, "Thus, the true value of the improvements should not be affected by the fact that the renewal expectancy value cannot be recovered in this suit." Here the Government is not willing to allow to the tenant the true value that the tenant owned improvements added to the unimproved fee whereas in the Scully case the full value contributed by the improvements to the property as a whole was allowed.

The Fisherman's Association case cited (174 F.2d 739) is not in point as the property taken was held under a permit which had been revoked prior to the taking. No possibility of renewal and continued use in place existed. Salvage or removal was the only possible use.

Commencing at page 16 of the Govern-

ment brief it is argued that Almota's only legal rights in the property consisted of its use to the end of the term plus the then removal or salvage value of the improvements; that the stipulated $130,000 compensation (App. 29) was full payment for the use value to the end of the term; that the right to remove the buildings was by stipulation restored to Almota; and since it could take the buildings that was full compensation for their removal value and hence Almota has been fully compensated for all legal property rights taken.

Several fallacies appear in that argument. First, Almota's legal rights were not so limited. On the very date of the taking it is by agreed stipulation clear that upon assignment of its lease and the delivery of a bill of sale to its improvements Almota could have received in a fair market sale the sum of $274,625 (App. 29-30). For over seven years from the date of taking,[1] Almota would have had a right to negotiate similar sales. At the end of the term of the lease and for six months thereafter (App. 7) it would still

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(1) May 26, 1967 (App. 23). The lease was to expire October 12, 1974 (App. 24).

have the right to sell and transfer its improvements for whatever they would bring upon the market. During those same periods it could negotiate with the railroad for the purchase of the fee and/or a renewal of its lease.

Using the Government's own reasoning, the $274,625 stipulated figure results in a probable value at the end of the term a great deal less than the true worth at that time. Respondent attributes the full $130,000 stipulated value as being for the use of the property during the term. That should likewise be true of the stipulated $274,625 value so that the remaining worth at the end of the term would be $144,625. Yet, at ordinary depreciation rates the facilities could be expected to then be worth in the area of $200,000[1] which would economically allow over $55,000 to be paid for the fee title or for a lease renewal or permit a discount of that amount to be made in a sale and still result in Almota obtaining the stipulated value of $274,625. I would be most amazing if

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(1) The $274,625 value depreciated at a 3% annual rate for 7 1/4 years would result in a depreciated value of approximately $214,000 at the end of the term.

offered compensation of far less than that amount failed to result in a purchase or the renewal where the land had only been renting for $114.20 per year (App. 6).

A second matter ignored in the argument concerning revesture is that this case has been presented upon an agreed stipulation to the effect that, if it is concluded that all elements which actually affect fair market value are considered, Almota should be awarded the sum of $274,625 (App. 29-30). If all of those elements of value are not entitled to consideration then Almota is to be awarded $130,000 (App. 29). Under either determination Almota was agreed to have the right to remove all or any portion of the improvements without any deduction for them. That removal right was not intended to compensate Almota for the value of its improvements at the end of the term. The Government had no actual use for the improvements (App. 28). By the very nature of the structures and their permanency they were presumably a liability to the Government involving substantial expense for their removal in the clearing of the area for the dam project for which they were acquired. They were of slight value to Almota considering that salvage would only produce junk

value and removal costs would be tremendous.

Much is made of the argument that the Government should not have to pay more than would be required of a private buyer. It is speculated that a private buyer could acquire the fee and then refuse to renew the lease or that the Government might have done the same thing. But this case must be decided upon the facts as they are and not upon what they might have been. Moreover, that contention is now precluded by the stipulated market values. In essence it is only an argument that the agreed market value of $274,625, considering all elements of value, is more than the true market value.

The stipulation must be read as a whole. The only condition of an award of $274,625 to Almota is a final determination by the court that all elements affecting market value must be considered.

Also, there is no argument whatsoever that that stipulated amount is in excess of the added value of the improvements to the property as a whole. Under the unit rule that amount should be award-

ed to the tenant[1] which the Government is here declining to do.

At page 28 of the brief the Manhatten case (388 F.2d 596) is misinterpreted. The Government would have the court believe that the case was only one considering salvage value whereas the Second Circuit in both that and the Upper Allegheny case (441 F.2d 356) are definitely laying down the rule that a tenant's fixtures upon condemnation are to be valued as used property for use in place where they are at the time of the taking regardless of the remaining term of the lease.[2]

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(1) See opening brief p. 34, 36. The rule is stated with approval in Carlock v. United States, 53 F.2d 926, Wash. D.C. Cir., as follows:
"The proper rule governing condemnation proceedings in cases of this sort is stated in ....104 A.429,... where the court said: 'in proceedings instituted and to condemn the reversionary interest, as well as the leasehold interest, the rule is to ascertain the entire compensation to be allowed as though the entire title or estate in the property belonged to one person, and then apportion the sum between the holders of the different interests, according to their respective rights.'"

(2) The matter was previously discussed at pages 25 & 26 of the opening brief.

It is true that in the Allegheny case value for use in place was not allowed not because the court did not follow the rule but because use in place was not their highest and best use.[1]

In the light of Respondent's entire argument and Petitioner's contentions it should be noted in further reply. By the cited statute (84 Stat. 1821, 33 U.S.C.A. 595a) on the taking of property for river improvements, by the agreement of the parties, by the prior proceedings in the lower courts, and by almost all of the cases, market value is here the measure of just compensation. The property taken was a leasehold of unimproved land plus the tenant improvements placed thereon. The value of the lease, exclusive of the improvements, is its use value to the end of the term less the rent. The continued use of the tenant's improvements in place at the end

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(1) The court stated: "Normally the value of trade fixtures for use in place will exceed their salvage value. But if a lessee had located or arranged his machinery or other fixtures in such a manner that their full economic potential cannot be realized on the premises, it is not inconceivable that the market will value them more highly for a better use elsewhere. This appears to have been the situation at Allegheny * * * *."

of the term was a reasonably probable use in view of the probability of a lease renewal. It was an element affecting the market value to the extent of $144,625 ($274,625 - $130,000). By the cases fair market value includes all uses to which the property may reasonably be put and all elements of value affecting the market. So determined the parties agreed that the fair market value of the Almota property taken, consisting of the leasehold and the tenant owned improvements, was the sum of $274,625. It follows that no lesser sum is just compensation or will place Almota in the same pecuniary position as before the taking.

Though not mandatory in this case it should be persuasive that the Congress now takes the view that the award of removal value to a tenant for his improvements is really not fair, sufficient, or just compensation for property taken. That is a legislative recognition of the justice of the Petitioner's contentions. The legislation referred to is 84 Stat. 1905, 42 U.S.C.A. 4652, adopted Jan. 2, 1971, which states in the pertinent portions: "(b) (1) For the purpose of determining the just compensation to be paid for any building,

structure, or other improvement * * * * the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such building, structure, or improvement for removal from the real property, whichever is the greater, shall be paid to the tenant therefor."

CONCLUSION

Petitioner concludes that the award of just compensation for its property rights taken requires the reversal of the judgment of the Ninth Circuit Court of Appeals entered in this case on Sept. 23, 1970, and reinstatement of the judgment of the District Court to thereby award Almota the sum of $274,625.

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(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ALMOTA FARMERS ELEVATOR & WAREHOUSE CO. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-951. Argued October 18, 1972—Decided January 16, 1973

Before and during the last of several successive leases, petitioner made substantial and permanent improvements that had a useful life in excess of the remaining lease term. With 7½ years to run on the then-current lease term, the United States contracted to acquire the underlying fee and began condemnation proceedings for the leasehold. The Court of Appeals reversed the District Court's ruling that just compensation required that the improvements be valued in place over their useful life without limitation to the remainder of the lease term. *Held:* In a condemnation proceeding, the concept of "just compensation" is measured by what a willing buyer would have paid for the improvements, taking into account the possibility that the lease might be renewed as well as that it might not. Pp. 4-9.

450 F. 2d 125, reversed and District Court judgment reinstated.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, MARSHALL, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, in which DOUGLAS, J., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE and BLACKMUN, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-951

Almota Farmers Elevator and Warehouse Company, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 16, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

Since 1919 the petitioner, Almota Farmers Elevator and Warehouse Company, has conducted grain elevator operations on land adjacent to the tracks of the Oregon-Washington Railroad and Navigation Company in the State of Washington. It has occupied the land under a series of successive leases from the railroad. In 1967, the Government instituted this eminent domain proceeding to acquire the petitioner's property interest by condemnation. At that time there were extensive buildings and other improvements, that had been erected on the land by the petitioner, and the then current lease had 7½ years to run.

In the District Court the Government contended that just compensation for the leasehold interest, including the structures, should be "the fair market value of the legal rights possessed by the defendant by virtue of the lease as of the date of taking," and that no consideration should be given to any additional value based on the expectation that the lease might be renewed. The petitioner urged that, rather than this technical "legal rights theory," just compensation should be measured by what a willing buyer would pay in an open market for the petitioner's leasehold.

As a practical matter the controversy centered upon the valuation to be placed upon the structures and their appurtenances. The parties stipulated that the Government had no need for these improvements and that the petitioner had a right to remove them. But that stipulation afforded the petitioner only what scant salvage value the buildings might bring. The Government offered compensation for the loss of the use and occupancy of the buildings only over the remaining term of the lease. The petitioner contended that this limitation upon compensation for the use of the structures would fail to award what a willing buyer would have paid for the lease with the improvements, since such a buyer would expect to have the lease renewed and to continue to use the improvements in place. The value of the buildings, machinery, and equipment in place would be substantially greater than their salvage value at the end of the lease term, and a purchaser in an open market would pay for the anticipated use of the buildings and for the savings he would realize from not having to construct new improvements himself. In sum, the dispute concerned whether Almota would have to be satisfied with its right to remove the structures with their consequent salvage value or whether it was entitled to an award reflecting the value of the improvements in place beyond the lease term.

In a pretrial ruling, the District Court accepted the petitioner's theory and held that Almota was to be compensated for the full market value of its leasehold "and building improvements thereon as of the date of taking . . . , the total value of said leasehold and improvements to be what the interests of said company therein could have been then sold for upon the open market considering all the elements and possibilities whatsoever found to then affect the market value of

those interests including but not exclusive of the possibilities of renewal of the lease and of the landlord requiring the removal of the improvements in the event of there being no lease renewal." The Court accordingly ruled that the petitioner was entitled to the full fair market value of the use of the land and of the buildings in place as they stood at the time of the taking, without limitation of such use to the remainder of the term of the existing lease.

On appeal, the Court of Appeals for the Ninth Circuit reversed, 450 F. 2d 125; it accepted the Government's theory that a tenant's expectancy in a lease renewal was not a compensable legal interest and could not be included in the valuation of structures that the tenant had built on the property. It rejected any award for the use of improvements beyond the lease term as "compensation for expectations disappointed by the exercise of the sovereign power of eminent domain, expectations not based upon any legally protected right, but based only . . . upon 'a speculation on a chance.'" 450 F. 2d, at 129. The Court explicitly refused to follow an *en banc* decision of the Second Circuit Court of Appeals, relied upon by the District Court, which had held that for condemnation purposes improvements made by a lessee are to be assessed at their value in place over their useful life without regard to the term of the lease. *United States* v. *Certain Property, Borough of Manhattan*, 388 F. 2d 596, 601.

In view of this conflict in the circuits, we granted certiorari, 405 U. S. 1039, to decide an important question of eminent domain law: "Whether, upon condemnation of a leasehold, a lessee with no right of renewal is entitled to receive as compensation the market value of its improvements without regard to the remaining term of its lease, because of the expectancy that the lease would

have been renewed."[1] We find that the view of the Court of Appeals for the Second Circuit is in accord with established principles of just compensation law under the Fifth Amendment, and therefore reverse the judgment before us and reinstate the judgment of the District Court.

The Fifth Amendment provides that private property shall not be taken for public use without "just compensation." "And 'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *United States* v. *Reynolds*, 397 U. S. 14, 16 (footnotes omitted). See also *United States* v. *Miller*, 317 U. S. 369, 373. To determine such monetary equivalence, the Court early established the concept of "market value": the owner is entitled to the fair market value of his property at the time of the taking. *New York* v. *Sage*, 239 U. S. 57, 61. See also *United States* v. *Reynolds*, *supra*, at 16; *United States* v. *Miller*, *supra*, at 374. And this value is normally to be ascertained from "what a willing buyer would pay in cash to a willing seller." *United States* v. *Miller*, *supra*, at 374. See *United States* v. *Virginia Electric and Power Co.*, 365 U. S. 624, 633.

By failing to value the improvements in place over their useful life—taking into account the possibility that the lease would be renewed as well as the possibility that

[1] This was the statement of the question presented by the Government in opposing the grant of the petition for certiorari. As the petitioner phrased the question, the Court was asked to decide: "In awarding just compensation to a tenant in the condemnation of a leasehold interest in real property, including tenant owned building improvements and fixtures situated thereon, *may an element of great inherent value in the improvements be excluded* merely because it does not, by itself, rise to the status of a legal property right." (Emphasis added.)

it might not—the Court of Appeals in this case failed to recognize what a willing buyer would have paid for the improvements. If there had been no condemnation, Almota would have continued to use the improvements during a renewed lease term, or if it sold the improvements to the fee owner or to a new lessee at the end of the lease term, it would have been compensated for the buyer's ability to use the improvements in place over their useful life. As Judge Friendly wrote for the Court of Appeals for the Second Circuit:

> "Lessors do desire, after all, to keep their properties leased, and an existing tenant usually has the inside track to a renewal for all kinds of reasons—avoidance of costly alterations, saving of brokerage commissions, perhaps even ordinary decency on the part of landlords. Thus, even when the lease has expired, the condemnation will often force the tenant to remove or abandon the fixtures long before he would otherwise have had to, as well as deprive him of the opportunity to deal with the landlord or a new tenant—the only two people for whom the fixtures would have a value unaffected by the heavy costs of disassembly and reassembly. The condemnor is not entitled to the benefit of assumptions, contrary to common experience, that the fixtures would be removed at the expiration of the stated term." *United States* v. *Certain Property, Borough of Manhattan*, 388 F. 2d 596, 601–602 (footnote omitted).

It seems particularly likely in this case that Almota could have sold the leasehold at a price which would have reflected the continued ability of the buyer to use the improvements over their useful life. Almota had an unbroken succession of leases since 1919, and it was in the interest of the railroad, as fee owner, to continue leasing the property, with its grain elevator facilities, in

order to promote grain shipments over its lines. In a free market Almota would hardly have sold the leasehold to a purchaser who paid only for the use of the facilities over the remainder of the lease term, with Almota retaining the right thereafter to remove the facilities—in effect, the right of salvage. "Because these fixtures diminish in value upon removal, a measure of damages less than their fair market value for use in place would constitute a substantial taking without just compensation. '[I]t is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of secondhand machinery and in so doing discharge the full measure of its duty.'" *United States* v. *1,132.50 Acres of Land, Etc., Upper Allegheny Sand and Gravel Co.*, 441 F. 2d 356, 358.[2]

United States v. *Petty Motor Co.*, 327 U. S. 372, upon which the Government primarily relies, does not lead to a contrary result. The Court did indicate that the measure of damages for the condemnation of a leasehold is to

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[2] The compensation to which Almota is entitled is hardly "totally set free from [its] property interest," as the dissent suggests. *Post*, p. —. The improvements are assuredly "private property" that the Government has "taken" and for which it acknowledges it must pay compensation. The only dispute in this case is over how those improvements are to be valued, not over whether Almota is to receive additional compensation for business losses. Almota may well be unable to operate a grain elevator business elsewhere; it may well lose the profits and other values of a going business, but it seeks compensation for none of that. *Mitchell* v. *United States*, 267 U. S. 341, did hold that the Government was not obliged to pay for business losses caused by condemnation. But it assuredly did not hold that the Government could fail to provide fair compensation for business improvements that are taken—dismiss them as worth no more than scrap value—simply because it did not intend to use them. Indeed, in *Mitchell* the Government paid compensation both for the land, including its "adaptability for use in a particular business," *id.*, at 344, and for the improvements thereon.

be measured in terms of the value of its use and occupancy for the remainder of the lease term, and the Court refused to elevate an expectation of renewal into a compensable legal interest. But the Court was not dealing there with the fair market value of improvements. Unlike *Petty Motor*, there is no question here of creating a legally cognizable value where none existed, or of compensating a mere incorporeal expectation.[3] The petitioner here has constructed the improvements and seeks only their fair market value. *Petty Motor* should not be read to allow the Government to escape paying what a willing buyer would pay for the same property.

The Government argues that it would be unreasonable to compensate Almota for the value of the improvements measured over their useful life, since the Government could purchase the fee and wait until the expiration of the lease term to take possession of the land.[4] Once it has purchased the fee, the argument goes, there is no further expectancy that the improvements will be used during their useful life since the Government will assuredly require their removal at the end of the term. But the taking for the dam was one act requiring proceed-

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[3] Hence, this is not a case where the petitioner is seeking compensation for lost opportunities, see *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–282; *Omnia Commercial Co.* v. *United States*, 261 U. S. 502. The petitioner seeks only the fair value of the property taken by the Government.

Nor is this a case where compensation is to be paid for "the value added to fee lands by their potential use in connection with [Government] permit lands," *United States* v. *Fuller*, *post*, p. —. for neither action by the Government nor location adjacent to public property contributed any element of value to Almota's leasehold interest.

[4] It was established at oral argument that while the Government had contracted to acquire the Railroad's interest, it had not acquired the fee at the time of the taking of the leasehold, nor did it have possession at the time of the trial or appeal.

ings against owners of two interests.[5] At the time of that "taking" Almota had an expectancy of continued occupancy of its grain elevator facilities. The Government must pay just compensation for those interests "probably within the scope of the project from the time the Government was committed to it." *United States* v. *Miller*, 317 U. S. 369, 377. Cf. *United States* v. *Reynolds*, 397 U. S. 14, 16–18. It may not take advantage of any depreciation in the property taken that is attributable to the project itself. *United States* v. *Reynolds*, *supra*, at 16; *United States* v. *Virginia Electric & Power Co.*, 365 U. S. 624, 635–636. At the time of the taking in this case, there was an expectancy that the improvements would be used beyond the lease term. But the Government has sought to pay compensation on the theory that at that time there was no possibility that the lease would be renewed and the improvements used beyond the lease term. It has asked that the improvements be valued as though there were no possibility of continued use.[6] That

[5] "It frequently happens in the case of a lease for a long term of years that the tenant erects buildings or puts fixtures into the buildings for his own use. Even if the buildings or fixtures are attached to the real estate and would pass with a conveyance of the land, as between landlord and tenant they remain personal property. In the absence of a special agreement to the contrary, such buildings or fixtures may be removed by the tenant at any time during the continuation of the lease, provided such removal may be made without injury to the freehold. This rule, however, exists entirely for the protection of the tenant, and cannot be invoked by the condemnor. If the buildings or fixtures are attached to the real estate, they must be treated as real estate in determining the total award. But in apportioning the award, they are treated as personal property and credited to the tenant." 4 Nichols on Eminent Domain § 13.121 [2] (rev. 3d ed. 1971) (footnotes omitted).

[6] Similarly, the dissent today would value the petitioner's interest after the Government has condemned the underlying fee, and thus after the value of the petitioner's interest has been diminished because the risk of nonrenewal of the lease has materialized. But

is not how the market would have valued such improvements; it is not what a private buyer would have paid Almota.

"The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 124 (1950), as it does from technical concepts of property law." *United States* v. *Fuller*, *post*, p. —. It is of course true that Almota should be in no better position than if it had sold its leasehold to a private buyer. But its position should surely be no worse.

The judgment before us is reversed and the judgment of the District Court reinstated.

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there was only one "taking," and at the time of that "taking" there was not only a risk that the lease would not be renewed, but a possibility that it would be and that the improvements would be used over their useful life.

SUPREME COURT OF THE UNITED STATES

No. 71-951

Almota Farmers Elevator and Warehouse Company, Petitioner, v. United States.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 16, 1973]

MR. JUSTICE POWELL, with whom MR. JUSTICE DOUGLAS joins, concurring.

I join the opinion of the Court, but add a few words to indicate what I find implicit in its rejection of the Government's claim to act as if it were Almota's landlord.

It is clear, first of all, that the market value of improvements placed on a leasehold interest will vary depending in major part upon the probable future conduct of the landlord. In this case, based on the experience of nearly half a century and the evident self-interest of the landlord railroad, this conduct could be predicted with considerable confidence. There was every expectation that the improvements would continue to have significant value beyond the term of the present lease. In a transaction between a willing buyer and a willing seller there can be no doubt that this value would have been accorded appropriate weight.

On different facts, the market value of Almota's interest might have been significantly lower. If, for example, the railroad had relocated its tracks before the Government entered the picture, the leasehold improvements would have been nearly valueless in the market. A risk which Almota took in erecting those improvements, the risk that the railroad would relocate its tracks, would have proven a poor one. The risk would have been sub-

stantially the same if, independently of the present navigation project, the Government had purchased the railroad with the intention of operating it, and thereafter had decided to relocate it or to discontinue operation. Under those circumstances, the Government could properly have acted as an ordinary landlord, and its lessees could have been expected to bear the risk that it would put its land to a new use.

Here, however, the Government held no interest in the land until its navigation project required the acquisition of both the fee and the leasehold interests. If, at that point, the Government had condemned both interests in a single proceeding, or in separate proceedings, Almota would have been entitled to compensation for the value of the improvements beyond the present lease term. Almota bore the risk that the railroad would change its plans, but should not be forced to bear the risk that the Government would condemn the fee and change its use. Where multiple properties or property interests are condemned for a particular public project, the Government must pay *pre-existing market value for each.* Neither the Government nor the condemnee may take advantage of "an alteration in market value attributable to the project itself." *United States* v. *Reynolds*, 397 U. S. 14, 16 (1969); cf. *United States* v. *Virginia Electric & Power Co.*, 365 U. S. 624, 635–636 (1960); *United States* v. *Miller*, 317 U. S. 369, 377 (1943).

The result should not be different merely because the Government arranged to acquire the fee interest by negotiation rather than by condemnation. Apart from cases where, as in *United States* v. *Rands*, 389 U. S. 121 (1967), the Government has a property interest antedating but within the bounds of its present project, it would be unjust to allow the Government to use "salami tactics" to reduce the amount of one property owner's

compensation by first acquiring an adjoining piece of property or another interest in the same property from another property owner. While *United States* v. *Petty Motor Company*, 327 U. S. 372 (1946), arguably establishes an exception to this principle, I subscribe to the Court's narrow construction of that case.

SUPREME COURT OF THE UNITED STATES

No. 71-951

Almota Farmers Elevator and Warehouse Company, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 16, 1973]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN join, dissenting.

Petitioner is entitled to compensation for so much of his private "property" that was taken for public use. The parties concede that petitioner's property interest here taken was the unexpired portion of a 20-year lease on land owned by the Oregon-Washington Railroad and Navigation Company near Colfax, Washington. The Court recognizes the limited nature of petitioner's interest in the real property taken, but concludes that it was entitled to have its leasehold and improvements valued in such a way as to include the probability that petitioner's 20-year lease would have been renewed by the railroad at its expiration.

There is a plausibility about the Court's resounding endorsement of the concept of "fair market value" as the touchstone for valuation, but the result reached by the Court seems to me to be quite at odds with our prior cases. Even in its sharply limited reading of *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946), the Court concedes that the petitioner's expectation of having its lease renewed upon expiration is not itself an interest in property for which he may be compensated. But the Court permits the same practical result to be reached by saying that, at least in the case of improvements,

the fair market value may be computed in terms of a willing buyer's expectation that the lease would be renewed.

In *United States* v. *Petty Motor Co.*, *supra*, the Government acquired by condemnation the use of a structure occupied by tenants in possession under leases for various unexpired terms. The Court held that the measure of damages for condemnation of a leasehold is the value of the tenant's use of the leasehold for the remainder of the agreed term, less the agreed rent. The Court considered the argument, essentially the same raised by petitioner here, that a history of past renewal of the leases to existing tenants creates a compensable expectancy, but held that the right to compensation should be measured solely on the basis of the remainder of the tenant's term under the lease itself. 327 U. S., at 380. In so deciding, the Court stated:

> "The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights. *Emery* v. *Boston Terminal Co.*, 178 Mass. 172, 185, 59 N. E. 763 [per Holmes, C. J.]:
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> " 'It appeared that the owners had been in the habit of renewing the petitioners' lease from time to time . . . . Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right.' " 327 U. S., at 380 n. 9.

The holding in *Petty* was consistent with a long line of cases to the effect that the Fifth Amendment does not require, on a taking of a property interest, compensation for mere expectancies of profit, or for the frustration of licenses or contractual rights which pertain to the land, but which are not specifically taken and which are not vested property interests. *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, 510 (1923); *Sinclair Pipe Line Co.* v. *United States*, 287 F. 2d 175, 178 (Ct. Cl. 1961); *Chicago, M., St. P. & P. R. Co.* v. *Chicago, R. I. & P. R. Co.*, 138 F. 2d 268, 270–271 (CA8 1943), cert. denied, 320 U. S. 804 (1944).

While the inquiry as to what property interest is taken by the condemnor and the inquiry as to how that property interest shall be valued are not identical ones, they cannot be divorced without seriously undermining a number of rules dealing with the law of eminent domain which this Court has evolved in a series of decisions through the years. The landowner, after all, is interested not in the legal terminology used to describe the property taken from him by the condemnor, but in the amount of money he is to be paid for that property. It will cause him little remorse to learn that his hope for a renewal of a lease for a term of years is not a property interest for which the government must pay, if in the same breath he is told that the lesser legal interest which he owns may be valued to include the hoped for renewal.

The notion of "fair market value" is not a universal formula for determining just compensation under the Fifth Amendment. In *United States* v. *Miller*, 317 U. S. 369, 374 (1943), the Court said of market value:

> "Respondents correctly say that value is to be ascertained as of the date of taking. But they insist that no element which goes to make up value as at that moment is to be discarded or eliminated. We think the proposition is too broadly stated."

It is quite apparent that the property on which the owner operates a prosperous retail establishment would command more in an open market sale than the fair value of so much of the enterprise as was "private property" within the meaning of the Fifth Amendment. Yet *Mitchell* v. *United States*, 267 U. S. 341 (1925), stands squarely for the proposition that the value added to the property taken by the existence of a going business is no part of the just compensation for which the Government must pay for taking the property:

> "No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land." 267 U. S., at 345.

More recently, in *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266, 283 (1943), the Court generalized further:

> "That which is not 'private property' within the meaning of the Fifth Amendment likewise may be a thing of value which is destroyed or impaired by the taking of lands by the United States. But like the business destroyed but not 'taken' in the *Mitchell* case it need not be reflected in the award due the landowner unless Congress so provides."

In either *Mitchell* or *Powelson*, the result would in all probability have been different had the Court applied the reasoning which it applies in this case. Here, too, the improvements on the property are not desired by the Government for the project in question, but its taking of petitioner's leasehold interest prevents his continuing to have their use for the indefinite future as he had anticipated. The Court says that although his "property" interest would have expired in seven years,

the market value of that interest may be computed on the basis of expectancies which do not rise to the level of a property interest under the Fifth Amendment.

If permissible methods of valuation are to be thus totally set free from the property interest which they purport to value, it is difficult to see why the same standards should not be applied to a going business. Although the Government does not take the going business, and although the business is not itself a "property" interest within the Fifth Amendment, since purchasers on the open market would have paid an added increment of value for the property because a business was located on it, it may well be that such increment of value is properly included in a condemnation award under the Court's holding today. And it will assuredly make no difference to the property owner to learn that destruction of a going business is not compensable, if he be assured that the property concededly taken upon which the business was located may be valued in such a way as to include the amount a purchaser would have paid for the business.

The extent to which the Court's decision in this case will unsettle condemnation law is obscured by the fact that the parties, motivated no doubt by condemnation lawyers' well-known propensity to enter into factual stipulations which present abstract questions of valuation theory for decision, have stipulated as to amounts to be awarded depending on which party prevails. But the underlying difficulty with petitioner's theory was lucidly demonstrated by the late Judge Madden in his opinion for the Court of Appeals in this case, referring to the similar holding of the Court of Appeals for the Tenth Circuit in *Scully* v. *United States*, 409 F. 2d 1061 (CA10 1969):

> "If the law were to go into the business of awarding compensation for an expectancy which never materialized, because the sovereign 'took' the sub-

> ject of the expectancy, should, in *Scully, supra, e. g.*, the one year lessees be compensated for the loss of a five year occupancy, a 50 year occupancy, a perpetual occupancy? In our instant case, was the stipulation based upon some actuarial computation such as the prospective life of the buildings and machinery, or the life of the railroad, or upon free-ranging guess work?" *United States* v. *22.95 Acres of Land*, 450 F. 2d 125, 129 (CA9 1971).

The Court's conclusion gains no support from its citation of the recognized principle that the Government may not take advantage of any depreciation in the property taken that is attributable to the project itself, *United States* v. *Reynolds*, 397 U. S. 14 (1970); *United States* v. *Miller*, 317 U. S. 369 (1943). The value of petitioner's property taken could not be diminished by the fact that the river improvement and navigation for which the Government took its property might have had a depressing effect on pre-existing market value. But the Government makes no such contention here. While under existing principles of constitutional eminent domain law the value of petitioner's property was not subject to diminution resulting from the effect on market value of the improvement which the Government proposed to construct, it *was* subject to the hazard of nonrenewal of its leasehold interest. The fact that the Government has condemned the underlying fee for the same project, and has therefore made the risk of nonrenewal a certainty, undoubtedly diminishes the market value of petitioner's leasehold interest. But the diminution results not from any depressing effect of the improvement which the Government will construct after having taken the leasehold, but from a materialization of the risk of transfer of ownership of the underlying fee to which its value was always subject.

In at least partially cutting loose the notion of "just compensation" from the notion of "private property" which has developed under the Fifth Amendment, the Court departs from the settled doctrine of numerous prior cases which have quite rigorously adhered to the principle that destruction of value by itself affords no occasion for compensation. *United States* v. *Fuller, post,* p. —; *United States* v. *Rands,* 389 U. S. 121 (1967). "[D]amage alone gives courts no power to require compensation where there is not an actual taking of property." *United States* v. *Willow River Power Co.,* 324 U. S. 499, 510 (1945). "[T]he existence of value alone does not generate interests protected by the Constitution against diminution by the government . . . ." *Reichelderfer* v. *Quinn,* 287 U. S. 315, 319 (1932). While the Court purports to follow this well-established principle by requiring the compensation paid to be determined on the basis of private property actually taken, its endorsement of valuation computed in part on an expectancy which is no part of the property taken represents a departure from this settled doctrine. I therefore dissent.